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91-2051

NO. __-___
IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF SOUTH DAKOTA IN ITS OWN BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN OF THE CHEYENNE RIVER SIOUX TRIBE AND WANITA MINOR, PERSONALLY AND AS DIRECTOR OF CHEYENNE RIVER SIOUX TRIBE GAME, FISH AND PARKS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATE OF SOUTH DAKOTA in its own behalf, and as parens patriae, Appellee,

v.

Gregg BOURLAND, personally and as Chairman of the Cheyenne River Sioux Tribe and Dennis Rousseau, personally and as Director of Cheyenne River Sioux Tribe Game, Fish and Parks, Appellants.

STATE OF SOUTH DAKOTA in its own behalf, and as parens patriae, Appellant,

v.

Gregg BOURLAND, personally and as Chairman of the Cheyenne River Sioux Tribe and Dennis Rousseau, personally and as Director of Cheyenne River Sioux Tribe Game, Fish and Parks, Appellees.

Nos. 90-5486, 90-5515.

United States Court of Appeals, Eighth Circuit.

Submitted May 15, 1991.

Decided Nov. 21, 1991.

Before BOWMAN, Circuit Judge, HEANEY and BRIGHT, Senior Circuit Judges.

BOWMAN, Circuit Judge.

This is an appeal from the decision of the District Court permanently enjoining the tribal defendants from regulating the hunting and fishing activities of nonmembers of the Cheyenne River Sioux Tribe ("Tribe") on certain lands within the Cheyenne River Reservation. We affirm in part, reverse in part, and remand in part.[1]

I.

The Great Sioux Reservation was established by the Treaty with the Sioux Indians, Apr. 29, 1868, 15 Stat. 635, 636 ("Fort Laramie Treaty"). It comprised virtually all of what is now South Dakota west of the Missouri River, as well as part

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[1]For purposes of this opinion, even though a cross-appeal was filed, the tribal defendants will be referred to, where appropriate, as "appellants" and the State as "appellee."

of what is now North Dakota. The Treaty explicitly recognized a number of tribal powers, including the exclusive right to use reservation lands. Id. at 636. In 1889, pursuant to the Act of March 2, 1889, ch. 405, 25 Stat. 888, the Great Sioux Reservation was divided into six separate reservations, one of which was the Cheyenne River Indian Reservation ("Reservation"). The Reservation lies in north-central South Dakota, with the Missouri River serving as its eastern border.

The Great Sioux Reservation was established at a time when the policy of the United States government was to enter into treaties with Indian tribes, establishing areas of sovereignty where tribes were allowed to govern themselves and to exercise control over "matters affecting tribal self-government." Felix S. Cohen, Handbook of Federal Indian Law 70 (Rennard Strickland,

et al., eds., Michie 1982) (1942) ("Handbook").[2] Land designated for the Reservation was held in trust by the United States for the benefit of the Tribe. In the late 1800s and early 1900s, however, the United States altered its policy regarding aboriginal tribes. The goal of the government became geared less towards self-sufficiency and self-rule for Indians; assimilation of Indians into the general population was the explicit goal. This was achieved by allowing non-Indians to acquire reservation land previously held in trust for Indians. "[A]n avowed purpose of the allotment policy was the ultimate destruction of tribal government." Montana v. United

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[2]This policy, however, was not constant during the treaty-making period of the 1800s. See Felix S. Cohen, Handbook of Federal Indian Law 62-70 (Rennard Strickland, et al., eds., Michie 1982) (1942) ("Handbook").

States, 450 U.S. 544, 559 n. 9, 101 S.Ct. 1245, 1255 n.9, 67 L.Ed.2d 493 (1981). The policy was carried out by, inter alia, the General Allotment Act of 1887 ("Dawes Act"), 24 Stat. 388 and the Act of May 29, 1908, ch. 218, 35 Stat. 460, the latter of which allowed Reservation "surplus" lands to be sold to nonmembers.[3] This policy of assimilation led to a vast reduction in the amount of reservation land held in trust by the United States for tribes or individual

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[3]The Act of March 2, 1889, which created the Cheyenne River Indian Reservation and five other reservations from what had been the Great Sioux Reservation, also authorized presidentially-appointed agents to allot parcels of Reservation land to individual Indians, who in turn, after a period of years, were allowed to alienate freely their parcels of land to anyone, including nonmembers and non-Indians. Act of Mar. 2, 1889, ch. 405, §§ 10, 11, 25 Stat. 888, 891.

Indians.[4] On the Cheyenne River Reservation, for example, land held in trust for Indians amounts to slightly less than half of the Reservation's total acreage.[5]

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[4]The Acts of 1889 and 1908, while enabling non-Indians to acquire title of Reservation land, did not diminish the Reservation. See Solem v. Bartlett, 465 U.S. 463, 104 S.Ct. 1161, 1171, 79 L.Ed.2d 443 (1984).

[5]According to the District Court, trust land held for individual Indians or the Tribe amounts to 1,395,729 acres, or 49.8% of the Reservation's 2,806,914 total acres. South Dakota v. Ducheneaux, Civ. No. 88-3049, Mem. Op. at 7, 9 (D.S.D. August 21, 1990) ("August Memorandum Opinion"), reprinted in Appellant's Addendum at 7, 9. The District Court also found that "about 1,395,729 acres, or 46.5 percent" oft he Reservation are held in fee simple by members and nonmembers. Id. at 9. The remaining 3.7% of the Reservation's acreage, the subject of this appeal, is the land taken by the United States for the Oahe Dam and Reservoir Project. Id. While the numbers cited by the court area not entirely free from minor error (46.5% of 2,806,914 is 1,305,215), this light discrepancy is not relevant to our decision.

Recognizing that the assimilation policy was not working as intended, the United States changed course in the 1930s to encourage tribal self-determination. In 1934 Congress passed the Indian Reorganization Act, codified as amended at 25 U.S.C. § 461 et. seq. (1988) ("IRA"), which allowed officially-recognized tribes to form their own constitutions and governments.[6] Pursuant to the IRA, the Cheyenne River Sioux Tribe enacted a tribal constitution and passed by-laws regulating hunting and fishing on the Reservation. South Dakota v. Ducheneaux,

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[6]The policy of encouraging Indian self-determination has been reaffirmed in the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq. (1988), the Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq. (1988), the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450, 450a-450n, 458, 458a-458e (1988), and the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq. (1988).

Civ. No. 88-3049, Mem.Op. at 9-10 (D.S.D. August 21, 1990) ("August Memorandum Opinion"), reprinted in Appellants' Addendum at 9-10. Congress later passed the Act of Aug. 15, 1953, Pub.L. No. 280, 67 Stat. 588 (codified in part at 18 U.S.C. § 1162 (1988) and 28 U.S.C. § 1360 (1988)) ("Public Law 280"), which was designed in part to transfer to certain state governments the power to regulate certain enumerated activities on Indian reservations. Included in Public Law 280 was a proviso recognizing that the law "shall [not] deprive any . . . Indian tribe . . . of any right . . . afforded under Federal treaty . . . with respect to hunting, trapping, or fishing or the control,

licensing or regulation thereof." 18 U.S.C. § 1162(b) (1988).[7]

In 1944, Congress passed the Flood Control Act, ch. 665, 58 Stat. 887 (1944) ("Flood Control Act"). This statute was enacted to allow the government to enter into negotiations with landowners along various stretches of the Missouri River to purchase tracts of riverfront land. The land was needed so that the Army Corps of Engineers could construct a series of dams along the River to prevent downstream flooding, to help with irrigation, and for other purposes.

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[7]In the 1940s and 1950s, the federal government briefly turned to a "termination policy" in Indian affairs. Important to our case is that while this policy's effects were broad, it explicitly was applied to only a few tribes; moreover, the policy's goal was aimed more at terminating the federal government's role in Indian affairs than at terminating tribal sovereignty. See Handbook at 152-80.

Much of the land sought by the Corps was owned by or for Indians or Indian tribes. In 1950, Congress passed Pub.L. No. 870, 64 Stat. 1093 (1950) ("Public Law 870"), authorizing the Army and the Department of Interior to negotiate a contract with the Cheyenne River Tribe and the Standing Rock Sioux Tribe for land needed for the Oahe Dam and Reservoir. In the early 1950s, Congress authorized the purchase of land from six tribes in South Dakota pursuant to the Flood Control Act.[8] By the Act of Sept. 3, 1954, Pub.L. No. 776, 68 Stat. 1191 ("Cheyenne River Act"), Congress appropriated $10,644,014 for payment to the Tribe in exchange for rights to approximately 105,000

[8]For a discussion regarding one of these transactions, see Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 813-14 (8th Cir. 1983), cert. denied, 464 U.S. 1042, 104 S.Ct. 707, 79 L.Ed.2d 171 (1984).

acres[9] of tribal and trust land abutting (and apparently partially underlying) the Missouri River.[10] Included in this appropriation were monies for the loss of grazing revenue, loss of wildlife, and relocation costs. The Act, however, did not eliminate all tribal interests in the taken land. It explicitly noted that the Tribe and its members retained the right to hunt and fish on the land, and the right to lease the unflooded portion of

[9]It is unclear whether the 105,000 acres referred to as the taken land purchased pursuant to the Cheyenne River Act includes the approximately 18,000 acres of taken land that was previously held in fee by non-Indians. Appellee's Brief at 1. As mentioned in n.5, supra, minor discrepancies of this sort are not legally significant to our opinion in this case.

[10]This land so acquired by the United States, along with the non-Indian fee land acquired by the United States in conjunction with the Flood Control Act of 1944, ch. 665, 58 Stat. 887 ("Flood Control Act"), will be referred to as the "taken" land or area.

the taken land. It also granted to the Tribe leasing rights to the taken area that previously had been non-Indian fee land. Joint Appendix, vol. II at 433-39.

For a period of time, the Tribe and the State of South Dakota were able to negotiate successfully an agreement resolving the issue of regulatory authority over hunting and fishing activities on Reservation lands. In 1988, however, after negotiations for the upcoming deer hunting season broke off, the Tribe announced that it would not honor state permits issued to people wishing to hunt on the Reservation. The State filed suit, asking the District Court to enjoin the tribal defendants from regulating the hunting and fishing activities of non-Indians on non-Indian fee land and the taken land in the Reservation. The court determined that the Tribe possessed no regulatory authority over nonmembers hunting and fishing on nonmember

fee land and the taken areas, and permanently enjoined the defendants from attempting to exercise such authority.

On appeal, the tribal defendants raise four issues: 1) the District Court erred in not requiring the State to join the Tribe as an indispensable party; 2) the District Court erred in not requiring the State to join the United States as an indispensable party; 3) the District Court erred in ruling that the tribal defendants have no regulatory authority over nonmember Indians (as distinct from non-Indians) on the land in question because the issue was neither pled nor tried; and 4) the District Court erred in determining that the defendants possess no authority to regulate non-Indian hunting and

fishing on the taken area.[11] On cross-appeal, the State urges us either to declare as dicta language in the District Court opinion concerning the reach of the Lacey Act, codified in relevant part at 16 U.S.C. §§ 3371-78 (1988), and the federal trespass statute, 18 U.S.C. § 1165 (1988), or to reverse the District Court with respect to its interpretation of these statutes.

II

The tribal defendants claim that the District Court erred in proceeding with the case because the United States and the Tribe are indispensable parties, and that the case should not have proceeded in their absence. We review trial court determinations of

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[11]The tribal defendants do not appeal the portion of the District Court's opinion holding that they do not have the authority to regulate non-Indian hunting and fishing on non-Indian fee land.

indispensability under Fed.R.Civ.P. 19 for abuse of discretion. See Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492, 534 (8th Cir. 1975), modified on other grounds, Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976); accord Sindia Expedition v. Wrecked and Abandoned Vessel, 895 F.2d 116, 121 (3rd Cir. 1990); Travelers Indem. Co. v. Dingwell, 884 F.2d 629, 635 (1st Cir. 1989); McVay v. Western Plains Serv. Corp, 823 F.2d 1395, 1401 (10th Cir. 1987); Northern Alaska Envtl. Ctr. v. Hodel, 803 F.2d 466, 468 (9th Cir. 1986); Pulitzer-Polster v. Pulitzer, 784 F.2d 1305, 1309 (5th Cir. 1986); but see Local 670 v. International Union, United Rubber, Cork, Linoleum and Plastic Workers, 822 F.2d 613, 619 (6th Cir. 1987), cert. denied, 484 U.S. 1019, 108 S.Ct. 731, 98 L.Ed.2d 679 (1988) (holding that determination of

indispensability is a legal conclusion subject to de novo review).

We hold that the District Court did not abuse its discretion in proceeding with the case without joining the United States as a party. The District Court issued its ruling on the assumption that the United States was an indispensable party pursuant to Rule 19(a) with respect to the taken area. It also assumed that the United States had not waived its sovereign immunity. The District Court, using the factors enumerated in Rule 19(b) and in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-12, 88 S.Ct. 733, 737-39, 19 L.Ed.2d 936 (1968), to evaluate whether the action should proceed, decided in "equity and good conscience . . . that the present parties should be allowed to proceed with this case." South Dakota v. Ducheneaux, Civ. No., 88-3049, Mem. Op. at 8, (D.S.D. July 3, 1989) ("July Memorandum

Opinion"), reprinted in Appellants' Addendum at 58, 65. We cannot say that this finding was an abuse of discretion.[12]

With respect to the Tribe, the District Court found that the Tribe was not an indispensable party. This finding was not an abuse of discretion. Although the State attacks the validity of the Tribe's regulations, its claim is premised on the argument that "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign . . . . [T]he power has been conferred in form but the grant is

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[12]It is doubtful whether the United States is an indispensable party to this action, as it appears complete relief can be accorded the parties involved and apparently there is no substantial risk that any of the parties will be subjected to "inconsistent obligations." Fed.R.Civ.P. 19(a). But we need not and do not decide that question.

lacking in substance because of its . . . invalidity." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690, 69 S.Ct. 1457, 1462, 93 L.Ed. 1628 (1949). The State's suit seeking injunctive relief against the named tribal officials therefore is proper, id. at 689-90, 69 S.Ct. at 1461-62, and the Tribe is not an indispensable party.

III

The tribal defendants also claim that the District Court erred in determining that they have no jurisdiction over the hunting and fishing activities of nonmember Indians on nonmember fee lands or the taken area. We agree. The issue of tribal jurisdiction over nonmember Indians was neither pled or tried; the complaint was limited to the question of jurisdiction over non-Indians. See Second Amended Complaint, reprinted in Joint Appendix, vol. I at 53. Issues not before

the trial court should not be addressed sua sponte. Contrary to the State's assertion, the Supreme Court's decision in Duro v. Reina, 495 U.S. 676, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990), does not resolve the issue of tribal civil jurisdiction over the hunting and fishing activity of nonmember Indians. Duro dealt only with tribal criminal jurisdiction over nonmember Indians. Id. 110 S.Ct. at 2056. Because tribal criminal jurisdiction and tribal civil jurisdiction have been treated differently by the courts, see Handbook at 245-46 (discussing cases), Duro cannot be said to have decided the issue of tribal civil jurisdiction. As this issue was not properly before the District Court, the portion of the District Court's opinion dealing with the defendants's (sic) regulatory authority over nonmember Indians is vacated.

IV.

In considering the State's claim that the tribal defendants have no authority to regulate non-Indian hunting and fishing on the taken land, we are required to pick up where we left off in Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809 (8th Cir. 1983), cert. denied, 464 U.S. 1042, 104 S.Ct. 707, 79 L.Ed.2d 171 (1984): we now must determine "whether the Tribe . . . has jurisdiction to regulate hunting and fishing by nonmembers of the Tribe within the . . . tak[en] areas." Id. at 825 n. 23.[13] Although Lower Brule left this question open, it decided other issues important to our

[13]We are not asked to decide, and we do not address, the question of whether the State possesses regulatory authority in the taken area. The complaint filed by the State asked only for a determination of tribal authority within the taken area, not for a declaration of the State's authority.

inquiry. First, it seems clear from Lower Brule that the Cheyenne River Act did not disestablish the boundaries of the Reservation. Cf. id. at 821 (holding that two sister taking acts, with language similar to that used in the Cheyenne River Act, did not disestablish reservation boundaries). Lower Brule also held that the taking acts did not abrogate the hunting and fishing rights guaranteed to the Sioux tribes in the Fort Laramie Treaty. Id. at 826-27. Thus the Sioux retain their right to hunt and fish on their reservation free from state regulation. Id. at 827.

From that apparent simplicity, however, regulatory complexity lingers. On the one hand, the right of the Tribe to regulate non-Indian hunting and fishing on fee land acquired by non-Indians pursuant to the allotment policy has been abrogated by Congress. Montana, 450 U.S. at 559, 101

S.Ct. at 1255. On the other hand, the Tribe retains regulatory authority over non-Indian hunting and fishing on land held in trust for the Tribe by the Untied States. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330, 103 S.Ct. 2378, 2384 76 L.Ed.2d 611 (1983); Montana, 450 U.S. at 557, 101 S.Ct. at 1254. The taken area, however, is neither non-Indian-owned fee land nor trust land. In determining the scope of the Tribe's regulatory power over this land, we must use the approach followed by the Supreme Court and by our Court in Lower Brule: tribal rights are abrogated only if Congress "has clearly expressed its intent to do so," keeping in mind that "doubtful expressions of intent must be resolved in favor of the Indians." Lower Brule, 711 F.2d at 827; see also Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 690, 99 S.Ct. 3055, 3077, 61

L.Ed.2d 823 (1979) ("[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights"), modified on other grounds sub nom., Washington v. United States, 444 U.S. 816, 100 S.Ct. 34, 62 L.Ed.2d 24 (1979); Menominee Tribe of Indians v. United States, 391 U.S. 404, 413, 88 S.Ct. 1705, 1711, 20 L.Ed.2d 697 (1968) ("'[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress'") (quoting Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox Co., 291 U.S. 138, 160, 54 S.Ct. 361, 367, 78 L.Ed. 695 (1934)); Iowa Mut. Ins. co. v. LaPlante, 480 U.S. 9, 18, 107 S.Ct. 971, 978, 94 L.Ed.2d 10 (1987) ("'[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent'") (quoting

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60, 98 S.Ct. 1670, 1678, 56 L.Ed.2d 106 (1978)); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247, 105 S.Ct. 1245, 1258, 84 L.Ed.2d 169 (1985) ("[I]t is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (citations omitted)).

Using this approach, we must identify the rights originally granted to the Tribe and track subsequent alterations to, and limitations of, those rights. The Fort Laramie Treaty granted the Tribe an exclusive right to control hunting and fishing on the Reservation. Fort Laramie Treaty, 15 Stat. 636; Lower Brule, 711 F.2d at 815; see also United States v. Dion, 476 U.S. 734, 738, 106 S.Ct. 2216, 2219, 90 L.Ed.2d 767 (1986) ("As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands

reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. . . . These rights need not be expressly mentioned in the treat.") (citation omitted) (unanimous opinion). Cf. Montana, 450 U.S. at 558-59, 101 S.Ct. at 1254-55 (Fort Laramie Treaty conferred the authority to regulate hunting and fishing on the reservation). Complete jurisdiction over hunting and fishing on the Reservation was not to last, however, as land on the Reservation fell into the hands of non-Indians pursuant to the allotment policy. As noted in Montana and Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989), non-Indian hunting and fishing on non-Indian reservation fee land is not necessarily subject to tribal regulation: "[A]ny regulatory power the Tribe might have under the treaty 'cannot apply to lands held

in fee by non-Indians.'" Brendale, 492 U.S. at 425, 109 S.Ct. at 3005 (quoting Montana, 450 U.S. at 559, 101 S.Ct. at 1255) (White, J., plurality opinion).[14]

The Montana and Brendale decisions are based on an analysis that found an unmistakable Congressional intent to abrogate tribal regulatory authority over non-Indian hunting and fishing on non-Indian fee land:

> We analyzed the effect of the Allotment Act on an Indian tribe's treaty rights to regulate activities of nonmembers on fee land in Montana . . . [W]e concluded that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." [Montana, 450 U.S. at 561, 101 S.Ct. at 1256]. In Montana, as in the present cases, the lands at issue had been alienated under the Allotment Act, and the Court concluded that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy

[14]Montana noted two exceptions to this rule. See n. 20, infra.

> was the ultimate destruction of tribal government." 450 U.S. at 560, n.9, 101 S.Ct. at 1256, n.9.

Brendale, 492 U.S. at 422-23, 109 S.Ct. at 3004 (citations omitted) (White, J., plurality opinion). It is because of the intent to destroy tribal government underlying the Allotment Acts that the Montana and Brendale Courts found that tribal regulatory authority over non-Indian hunting and fishing on non-Indian fee land had been abrogated. Accordingly, in order for us to determine the Tribe's jurisdiction over the taken land, we must examine the policy behind the Cheyenne River Act to see if Congress clearly expressed an intent to divest the Tribe of regulatory authority over non-Indian hunting and fishing activity on the taken area. See Dion, 476 U.S. at 738-39, 106 S.Ct. at 2219-20.

The State contends that Section Four of the Flood Control Act, codified at 16 U.S.C.

§ 460d (1988) contains language that evinces a clear intent to abrogate the Tribe's regulatory rights with respect to hunting and fishing on the taken land. Section Four reads in relevant part: "No use of [the reservoirs created pursuant to the Act] shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated." Id. This language is not a sufficiently clear expression of an intention to divest tribal regulatory authority on the taken area. Lower Brule, 711 F.2d at 826-27.

In Lower Brule, we noted that this language in Section Four "cannot be viewed in isolation. . . . The 1944 act envisions a scheme of federal--not state--regulation over flood control projects." Id. at 825 n.23. Section Four merely insures that state fish and game authority, where already in effect, would not be preempted by the federal

government. It means "only that the Secretary of the Army cannot promulgate regulations regarding recreational activities by the 'general public' within 'public park and recreation facilities' which contravene state conservation laws." Id. It cannot be read to evince a "transfer" of authority from the Tribe to the State, especially in light of the fact that tribal rights are never mentioned in Section Four.[15] If we were to read Section Four as the State urges, the State, and not the Tribe, would have

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[15]Indeed, the only mention of Indians in the Flood Control Act occurs in Section 9(c), which states that "irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands." Flood Control Act, 58 Stat. 891. This reference in no way implicates tribal regulatory authority; at most, it can be viewed as support for the notion that the Flood Control Act meant to retain the status quo with respect to Indian rights.

regulatory authority over Indians hunting and fishing on the taken area. This result, of course, expressly was rejected in Lower Brule. As we recognized, "there is simply no indication in the legislative history that Congress even considered Indian rights when it adopted section 4." Lower Brule, 711 F.2d at 825 n.23. Thus, Section Four falls well short of the required "clear[] express[ion] [of Congressional] intent." Id. at 827.[16]

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[16]It bears repeating that the Flood Control Act was passed during a period when the federal government's "Indian policy" was to promote tribal autonomy and self-government, see supra at 987-988. This is in distinct contrast to the explicit policy in place during the time the Allotment Acts were enacted; namely, a policy of "destruction of tribal government." Montana v. United States, 450 U.S. 544, 560 n.9, 101 S.Ct. 1245, 1256 n.9, 67 L.Ed.2d 493 (1981). Considered in this context, the bid to view Section Four of the Flood Control Act as a clear expression of an intent to abrogate Tribal rights loses even more stature.

The State also points to Public Law 870, which authorized the Corps of Engineers and the Interior Department to negotiate a contract with the Tribe for the land needed to construct the Oahe Dam and Reservoir. The bill introduced in the Senate leading up to the passage of Public Law 870 contained a section stating that the contract shall "provide for the preservation of treaty rights of the tribe. . . in regard to fishing, hunting, and trapping insofar as is practicable under the physical conditions existing when the Oahe project is completed." S. 1488, 81st Cong., 1st Sess., § 2(e)(1949), reprinted in Joint Appendix, vol. III at 561. The House version of the bill contained virtually identical language. H.R. 5372, 81st Cong., 1st Sess. § 2(d) (1949), reprinted in Joint Appendix, vol. III at 552.

In its final version, however, Public Law 870 contained no such express language.

Instead, it simply provided for "just compensation for lands and improvements and interests therein." 64 Stat. 1094. The State contends that this history "show[s] that the Congress considered and rejected the possibility of retaining in the Tribe its hunting and fishing treaty rights." Appellee's Brief at 21. We disagree, as such analysis turns Washington and Menominee on their heads. Proper analysis of Indian legislation finds the elimination of treaty rights only when such action is clearly expressed; statutes are not examined for an affirmative reaffirmation of previously-granted treaty rights. We find no clear expression in Public Law 870 of an intent to abrogate the Tribe's regulatory jurisdiction over non-Indians hunting and fishing in the taken area.

The State next turns to the Cheyenne River Act for evidence of an intent to

abrogate the Tribe's regulatory powers on the taken land. The purpose of the Cheyenne River Act, as stated in its preamble, was to "provide for the acquisition of lands by the United States required for the reservoir created by the construction of the Oahe Dam. . . and for rehabilitation of the Indians of the Cheyenne River Sioux Reservation, South Dakota, and for other purposes." 68 Stat. 1191. The dam was built for irrigation and flood control purposes, not for purposes of settling non-Indians on the taken lands. Lower Brule, 711 F.2d at 820; see also ETSI Pipeline Project v. Missouri, 484 U.S. 495, 502, 108 S.Ct. 805, 810, 98 L.Ed.2d 898 (1988) (stating that the purpose of the Flood Control Act was to erect the Oahe Dam).

The Cheyenne River Act "convey[ed] to the United States all tribal, allotted, assigned, and inherited lands or interests

within said Cheyenne River Reservation belonging to the Indians of said reservation [needed for the Oahe Dam and Reservoir], . . . subject, however, to the conditions of this agreement hereinafter set forth. . . ." 68 Stat. 1191. Among the conditions placed on the conveyance were that "all mineral rights . . . within the taken area" would be reserved to the Tribe or its members, 68 Stat. 1192; that "[t]he members of the said Indian Tribe shall have the right without charge to cut and remove all timber and salvage any portion" of the improvements on the taken area, id.; that the members of the Tribe residing within the taken area "shall have the right without charge to remain on and use the lands" until the gates of the Dam were closed, id.; that the Tribe and its members "shall have the right to graze stock" on the unflooded portion of the taken area, including land previously held in fee by

non-Indians, 68 Stat. 1193; and that the "Tribal Council and the members of the said Indian tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish" in the taken area, including the reservoir, "subject, however, to regulations governing the corresponding use by other citizens of the United States." Id.

The conveyance of tribal land to the United States also was conditioned upon the payment for costs of relocating "Indian cemeteries, tribal monuments and shrines within the taken area," id. at 1191, and for the costs of relocating schools, hospitals, and other facilities, id. at 1192; and upon payment for

> the purpose of complete rehabilitation for all members of said Tribe who are residents of the [Reservation], whether or not residing within the taking area of the Oahe Project, and for relocating and reestablishing

> members of said Tribe who reside [in the taken area] to the extent that the economic, social, religious, and community life of all said Indians shall be restored to a condition not less advantageous to said Indians than the condition that the said Indians now are in.

68 Stat. 1192.

It is obvious, then, that the Cheyenne River Act was not a simple conveyance of land and all attendant interests in the land. Significant portions of the "bundle of property rights" explicitly were reserved to the Tribe. The purpose of the Act, unlike that of the Allotment Act at issue in Montana, was not the destruction of tribal self-government, but was only to acquire the property rights necessary to construct and operate the Oahe Dam and Reservoir.[17] The

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[17]The Corps of Engineers was authorized to negotiate a contract to "provide for
(Footnote Continued)

tribe retained significant rights in the taken land, including the leasing rights to grazing land previously held in fee by non-Indians. Joint Appendix, vol. II at 433-39. We recognized in Lower Brule that "[c]ontinued Indian control of [the taken area] is not inconsistent with the federal government's purpose in acquiring the property, as might be the case if, for example, the reservation was acquired to permit settlement by non-Indians." Lower Brule, 711 F.2d at 818 n.10.

Examination of the legislative history of the Act reveals no clear intent to eliminate tribal regulatory rights. In a

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(Footnote Continued)
conveyance to the United States of the title to all tribal, allotted, and inherited lands or interests therein belonging to the Indians of the tribe which are required by the United States for the Oahe Dam and Reservoir." H.R. Rep. No. 2484, 83rd Cong., 2d Sess., at 3 (1954) (emphasis added).

letter appended to the House Report on the Act, the Department of the Army reported that the Corps of Engineer opposed the section of the Act recognizing that the Tribe retained its hunting and fishing rights on the taken area, H.R.Rep. No.2484, 83rd Cong., 2d Sess. at 11 (1954), but Congress declined to remove the language. Neither the House Committee Report, H.R.Rep. 2484 at 1, not the Senate Committee Report, S.Rep. No. 2489, 83rd Cong., 2d Sess. 1 (1954), both of which accompanied the Act, make any mention of the jurisdictional issue concerning regulatory authority over hunting and fishing on the taken lands. Nor does the letter from the Assistant Secretary of the Interior Department, attached to both Committee Reports, discuss the issue. As the District Court noted in its opinion, "[c]ircumstances surrounding the Cheyenne River Act indicate that the jurisdiction issue simply was not

considered." August Memorandum Opinion at 45, reprinted in Appellant's Addendum at 45.

We agree with the District Court's conclusion that Congress did not consider the issue of jurisdiction to regulate hunting and fishing when enacting the Cheyenne River Act. The significance we attach to this lack of consideration, however, is markedly different from the significance the District Court attached to it. The District Court assumed that the taken land could not be distinguished from fee land alienated pursuant to the Allotment Acts as described in Montana. It then used the absence of an intent to deal with the jurisdictional issue as a basis for concluding that Congress abrogated tribal regulatory rights via the Act and declined affirmatively to grant such rights back to the Tribe. In so proceeding, the District Court erred. The correct analysis, the one counselled by the Supreme

Court, is to look to the purpose of the Act and to decline a jurisdictional issue left unresolved by the language of the Act in light of that purpose. As the purpose of the Act was simply to enable the United States to acquire the land needed for the construction of the Oahe Dam and Reservoir, and to do so with as little disruption as possible to the life of the Tribe, the Tribe must be given the benefit of the doubt. We do not have here the essential "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treat." Dion, 476 U.S. at 740 106 S.Ct. at 2220. Thus, applying Dion, 476 U.S. at 738-40, 106 S.Ct. at 2219-21, Washington, 443 U.S. at 690, 99 S.Ct. at 3076, and Menominee, 391 U.S. at 413, 88 S.Ct. at 1711, we conclude that the Tribe's treaty based right

to regulate non-Indian hunting and fishing activities on the portion of the taken area conveyed pursuant to the Cheyenne River Act has not been abrogated.[18] Cf. Iowa Mut. Ins., 480 U.S. at 18, 107 S.Ct. at 977-78 ("'Because the Tribe retains all inherent attributes of sovereignty that have not been

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[18]Our holding, recognizing tribal regulatory authority over non-Indians on land not held by or for Indians without first conducting a Montana analysis, is not unique. In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330, 103 S. Ct. 2378, 2384, 76 L.Ed.2d 611 (1983), a unanimous Supreme Court noted that New Mexico had conceded that the Tribe may regulate non-member hunting and fishing on the reservation. No mention was made, however, of a possible conflict with the Court's Montana decision concerning the land on the reservation not owned by or for Indians. Although such land was only a small part of the reservation (193.85 acres out of a total of 460,000 acres), Mescalero, 462 U.S. at 326, 103 S.Ct. at 2382, it is instructive that there was no dispute or discussion concerning jurisdiction over this land. In fact, the Court declined to allow the State even concurrent jurisdiction over this land. Id. at 344, 103 S.Ct. at 2392.

divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.'")(quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 n. 14, 102 S.Ct. 894, 907 n. 14, 71 L.Ed.2d 21 (1982)). The order of the District Court permanently enjoining the defendants from enforcing tribal hunting and fishing regulations on such land therefore is reversed.

This is not to say, however, that the Tribe is free entirely to exclude non-Indians from hunting and fishing on the portion of the taken land over which it has control. The Tribe's "right to hunt and fish in and on the [Oahe Dam] shoreline and reservoir [is] subject, however, to regulations governing the corresponding use by other citizens of the United States." Cheyenne River Act, 68 Stat. 119 . Further, Section Four of the Flood Control Act requires that the "water

areas of all such projects shall be open to public use generally." 16 U.S.C. § 460d. It appears, then, that the Tribe may not enact a flat ban on non-Indian hunting or fishing on the portion of the taken are subject to tribal jurisdiction, nor may it impose unreasonably discriminatory limits on such activities. The scope of the Tribe's regulations are not presently at issue, however, and so we decline to address this question further.

With respect to the portion of the taken area that is comprised of land other than that conveyed to the United States pursuant to the Cheyenne River Act, we remand the case to the District Court. According to the State, the taken area includes approximately 18,000 acres of land which previously had been held by non-Indians. Appellee's Brief at 1. This land cannot be grouped with the taken land previously held by or for Indians.

As we have noted, neither the Flood Control Act, Public Law 870, nor the Cheyenne River Act addresses the issue of tribal jurisdiction within the taken area. With respect to the 18,000 acres of taken land previously held in fee by non-Indians, this cuts against the Tribe. Congress has not affirmatively granted to the Tribe regulatory authority over such land. Since Montana held that tribes have been divested of their regulatory authority over non-Indians hunting and fishing on land held in fee by non-Indians pursuant to an allotment act, the lack of a grant of such power requires us to conclude that the Tribe does not possess such authority, unless one of the Montana

exceptions is met.[19] Montana, 450 U.S. at 559, 565-66, 101 S.Ct. at 1255, 1258.

The District Court found that the taken area has not a "pristine," or closed, area, as that term is used in Justice Stevens' plurality opinion in Brendale, 492 U.S. at 439, 445, 109 S.Ct. at 3012, 3015. August Memorandum Opinion at 17, reprinted in Appellants' Addendum at 17. Because the 18,000 acres within the taken area are in an "open" area, the analysis used by Justice White in his plurality opinion in Brendale should be applied to this acreage. According to Justice White's opinion, the 18,000 acres should be analyzed under the Montana

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[19]Our order is based, of course, on the assumption that these 18,000 acres previously had been held in fee by non-Indians pursuant to an allotment act. If this is not the case, then the analysis of the jurisdictional issue concerning this land may be different.

standard. Brendale, 492 U.S. at 421-33, 109 S.Ct. at 3003-09. The District Court performed such an analysis of the taken area in whole, and found that neither of the exceptions to the general rule laid out in Montana applied. However, in light of our holding that the tribal defendants possess regulatory authority over the rest of the taken area, it would be appropriate for the District Court to again undertake a Montana analysis, limiting its inquiry to the 18,000 acres in question.[20]

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[20]The exceptions noted in Montana that would allow tribes to exercise regulatory authority over non-Indian activity on land held in fee by non-Indians are: 1) the "activities of nonmembers who enter consensual relationships with the tribe or its members," Montana, 450 U.S. at 565, 101 S.Ct. at1258; and 2) the "conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the
(Footnote Continued)

We recognize that the jurisdictional map resulting from our opinion may be a confusing "checkerboard," with neighboring tracts of land subject to different regulations.[21] In fact, however, a "checkerboard" pattern of jurisdiction already exists on the Reservation, as non-Indians hunting on non-Indian fee land are subject to a different regulatory scheme from the one they are subject to when they hunt on (possibly neighboring) tribal land. The Supreme Court in Montana and Brendale authorized such

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(Footnote Continued)
health or welfare of the tribe." Id. at 566, 101 S.Ct. at 1258. It is conceivable that the District Court may find that non-Indian hunting and fishing on the 18,000 acres within the taken land meets one of these exceptions, in light of our decision that the Tribe retains regulatory authority over the remainder of the taken land.

[21]The potential for jurisdictional confusion is heightened with respect to the submerged portion of the taken area.

"checkerboard" jurisdiction by mandating that neighboring tracts of land be subject to different regulatory authorities on the basis of the type of ownership, or the nature, of the land. This mandated "checkerboarding" has been in effect now for at least eleven years; if it is a problem that needs fixing, the remedy lies with Congress, not the courts.[22]

This "checkerboarding" jurisdictional problem does give us, however, a reason to take the time to urge upon the parties the benefit of a negotiated settlement. As long as the issue of tribal jurisdiction is

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[22]The problem, if there is one, is not the direct result of the Montana opinion. "Checkerboard" jurisdiction is the result of frequent changes of course by the federal government in its policies concerning the Indians and their land. Over the years, these policy changes have brought about contradictory and confusing results.

avoided by Congress, jurisdictional problems like those encountered in this case are sure to continue to be presented;[23] litigated results are likely to leave all parties less than satisfied. In this case, each party could benefit from a negotiated settlement of the jurisdictional issue. As was noted at oral argument, this case "cries out" for a settlement. We are hopeful some reasonable accommodation satisfactory to both parties can be reached.

V

On cross-appeal, the State takes issue with language in the District Court opinion concerning both the Lacey Act, 16 U.S.C. §§ 3371-78, and the federal trespass statute, 18 U.S.C. § 1165. As the District Court itself noted, "[t]he scope of the federal

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[23]See, i.e., n. 13. supra.

government's prosecutorial powers under the Lacey Act is unrelated to the question whether the Tribe can exclude non-members from the taken area or fee lands." August Memorandum Opinion at 51, reprinted in Appellants' Addendum at 51 (emphasis in original). The court's discussion concerning the scope of the Lacey Act therefore is dicta. With respect to the discussion in the District Court's opinion concerning the federal trespass statute, the District Court again made passing reference to a source of federal, not tribal jurisdiction. August Memorandum Opinion at 46, reprinted in Appellant's Addendum at 46. Such language also is dicta.

VI

To sum up, we affirm the District Court's decision not to join either the Tribe of the United States as an indispensable party. We vacate the order of the District

Court to the extent that it deals with tribal regulatory authority over nonmember Indians. We reverse the order of the District Court permanently enjoining the tribal defendants from enforcing tribal hunting and fishing regulations on the portion of the taken land conveyed pursuant to the Cheyenne River Act. Finally, with respect to the portion of the taken area comprising land other than that conveyed to the United States pursuant to the Cheyenne River Act, we remand the case to the District Court for proceedings consistent with this opinion.

FILED MAY 6, 1992

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-5486

State of South Dakota in its own behalf, and as parens patriae,

Appellee,

v.

Gregg Bourland, personally and as Chairman of the Cheyenne River Sioux Tribe and Dennis Rousseau, personally and as Director of Cheyenne River Sioux Tribe Game, Fish and Parks,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

No. 90-5515

State of South Dakota in its own behalf, and as parens patriae,

Appellant,

v.

Gregg Bourland, personally and as Chairman of the Cheyenne River Sioux Tribe and Dennis Rousseau, personally and as Director of Cheyenne River Sioux Tribe Game, Fish and Parks,

Appellees.

Appeal from the United States District Court for the District of South Dakota.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this case is affirmed in

part, reversed in part and remanded to the district court for proceedings consistent with the opinion of this Court.

November 21, 1991

A true copy.

ATTEST: Michael E. Gans
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

United States Court of Appeals,
FOR THE EIGHTH CIRCUIT

No. 90-5486/5515SDP

State of South Dakota,	*	
	*	
Appellant,	*	
	*	ORDER DENYING
v.	*	PETITION FOR
	*	REHEARING AND
Gregg Bourland,	*	SUGGESTION FOR
	*	REHEARING EN BANC
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

March 23, 1992

Order Entered at the Direction of the Court:

Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 57501

August 21, 1990

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RE: CIVIL NO. 88-3049
STATE OF SOUTH DAKOTA, Plaintiff,
vs.
WAYNE DUCHENEAUX, personally and as Chairman of the Cheyenne River Sioux Tribe, and LENITA MINER, personally and as Director of Cheyenne River Sioux Tribe Game, Fish and Parks, Defendants.

Dear Counsel:

MEMORANDUM OPINION

This action for declaratory and injunctive relief was brought by the State of South Dakota against tribal defendants Wayne Ducheneaux, chairman of the Cheyenne River Sioux Tribal Council, and Lenita Miner, director of the Cheyenne River Sioux Tribe Game, Fish and Parks. The controversy involves the extent of tribal hunting and fishing jurisdiction over nonmembers[24] on

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[24]Following the United States Supreme Court's recent opinion in Duro v. Reina, --- U.S. ---, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990), a decision on the limits of tribal civil jurisdiction over non-Indians on

(Footnote Continued)

lands within the exterior boundaries of the

(Footnote Continued)
certain reservation lands should also decide the limits of tribal civil jurisdiction over nonmember Indians on those same lands. Justice Kennedy, writing for the majority, aptly summed up the Court's holding:

> The question we must answer is whether the sovereignty retained by the tribes in their dependent status within our scheme of government includes the power of criminal jurisdiction over nonmembers.
>
> We think the rationale of our decisions in Oliphant [v. Suquamish Indian Tribe, 435 U.S. 191, 98 S. Ct. 1011, 55 L.Ed. 2d 209 (1978)] and [(United States v.] Wheeler, [435 U.S. 313, 98 S. Ct. 1079, 55 L.Ed.2d 303 (1978)] as well as subsequent cases, compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members.

Duro, 110 S. Ct. at 2059.

Even though the state's complaint seeks a determination of tribal jurisdiction over "non-Indians" without reference to nonmember Indians, Duro effectively eliminates any distinction. Accordingly, throughout this
(Footnote Continued)

Cheyenne River Reservation no longer owned by the Cheyenne River Sioux Tribe (Tribe) or any of its members. These lands either are (1) held in fee by nonmembers or (2) were taken by the United States to construct the Oahe dam and reservoir. As this case concerns tribal rights and powers granted by various treaties and federal statutes, the Court has jurisdiction in this case pursuant to 28 U.S.C. §§ 1331.

After the State and the tribal defendants were unable to reach an agreement for the 1988 deer season for Dewey and Ziebach counties, South Dakota on its own

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(Footnote Continued)
opinion the Court refers to both nonmember Indians and non-Indians as "nonmembers." See Lower Brule Sioux Tribe v. South Dakota, 540 F. Supp. 276, 288 n.14 (D.S.D. 1982), rev'd on other grounds, 711 F.2d 809 (8th Cir. 1983).

behalf and on behalf of its citizens parens patriae sought the following relief:

> WHEREFORE, the State of South Dakota respectfully requests this Court as follows:
>
> A. To assume immediate jurisdiction over this matter.
>
> B. Issue a declaratory judgment determining:
>
> (1) Defendants have no jurisdiction to arrest and try non-Indians within the boundaries of the Cheyenne River Sioux Tribe [sic] for any offense; and
>
> (2) Defendants have no jurisdiction to exclude non-Indians from hunting on fee lands or public lands and waters within or purportedly within the Cheyenne River Sioux Reservation, including land and water areas taken by the United States for the building of the Oahe Reservoir.
>
> (3) In the alternative to paragraphs (1) and (2) above, that the reservation has been diminished by the federal acts taking lands and overlying waters for the reservoir and, if found to be necessary, by the tribal members' consent to the federal actions.
>
> * * *

Plaintiff's Second Amended Complaint, p. 9 (February 6, 1989).

South Dakota contends that Congress intended to disestablish the reservation boundaries when the subject lands were taken out of trust status and conveyed either to nonmembers or the United States. In the alternative, the State argues that treaty rights conferring regulatory authority upon the Tribe over hunting and fishing by nonmembers have been abrogated and that inherent Indian sovereignty does not necessitate tribal civil jurisdiction over this matter. Finally, the State interprets the tribal defendants' admonition as threatening impermissible criminal prosecution if sportsmen fail to comply with tribal licensing regulations. Thus, even if the Tribe has jurisdiction over nonmembers, the State argues that the defendants would exercise tribal jurisdiction in a manner proscribed by law.

The tribal defendants point to past cases which have held that no disestablishment of the reservation boundaries occurred. In addition, they argue that those acts of Congress which allowed the transfer of tribally-owned lands to nonmembers or the federal government reserved tribal jurisdiction over all persons hunting and fishing on those lands. The defendants also assert that, because tribal civil jurisdiction derives from rights and powers inherent in the Tribe as a sovereign government, they have the authority to enforce tribal licensing regulations against nonmembers because the Tribe has always retained power over all hunting and fishing within the reservation. Finally, the tribal defendants deny that they would impose criminal sanctions against nonmember violators as the Cheyenne River Sioux Tribal

Court has held that it may impose only civil sanctions against nonmembers.

Having considered carefully the contentions of all involved, the Court finds that, while the lands removed from trust status did not disestablish the reservation boundaries, the Tribe nonetheless has no civil jurisdiction over the hunting and fishing activities of nonmembers on those lands. The tribal defendants, therefore, are permanently enjoined from area or fee lands and from imposing tribal game licensing regulations upon them.

BACKGROUND

I

The Cheyenne River Reservation lies wholly within Dewey and Ziebach counties in north-central South Dakota, bordered on the east by the Missouri River. Early in the fall of 1988, representatives of the South Dakota Department of Game, Fish and Parks

submitted a proposed agreement for the 1988 Dewey-Ziebach deer hunting season to the Tribe. The State later submitted a second proposed agreement after negotiations with the Tribe. During these negotiations, tribal representatives expressed concern that the proposal did not adequately protect the grazing permit rights of tribal members on a strip of land adjacent to the Missouri River called the "taken area." The Tribe sought to include a provision requiring that any nonmember wishing to hunt on the taken area must first secure tribal permission. The State refused to grant this concession.

The State filed its complaint after tribal representatives issued this announcement to the local media:

> DUE TO THE STATE OF SOUTH DAKOTA'S INTRANSIGENCE, ALL HUNTERS MUST NOW HOLD A CHEYENNE RIVER SIOUX TRIBAL HUNTING LICENSE TO HUNT ON ANY AND ALL LANDS WITHIN THE EXTERIOR BOUNDARIES OF THE RESERVATION. THE STATE LICENSES WILL NO LONGER BE

> HONORED AND VIOLATORS ARE SUBJECT TO PROSECUTION IN TRIBAL COURT.

The tribal defendants initially sought to dismiss the complaint. The Court, by order and accompanying memorandum opinion filed July 3, 1989, denied the motion. Although the parties addressed the issue whether the sanctions threatened by the tribal defendants against nonmember violators were criminal in nature, the Court focused on whether the United States and the Tribe itself were indispensable parties who could not be sued under the doctrine of sovereign immunity. Guided by Fed.R.Civ.P. 19, this Court concluded that, notwithstanding that sovereign immunity prohibited maintaining the action against either the United States or the Tribe itself, the United States and the Tribe were not indispensable parties to the

lawsuit.[25] The Court adheres to its earlier ruling.

II

The treaty of April 29, 1868, 15 Stat. 635 (1868) (hereafter 1868 Fort Laramie Treaty) established the boundaries of the Great Sioux Nation. Out of this vast territory, Congress later set aside for the Tribe what is now the Cheyenne River Reservation. Act of March 2, 1889, 25 Stat. 889 (1889) (hereafter Act of 1889).

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[25]This Court noted (1) that the interests of the United States would not be impaired and that equity and good conscience warranted continued litigation; and (2) that the complaint targeted conduct of the tribal defendants as outside the scope of their authority. Dismissal for failure to join the Tribe was improper because the question whether the tribal defendants were acting beyond their authority was the precise question to be addressed at the trial on the permanent injunction motion.

Not all the land within the reservation is owned by the Tribe, its members or held in trust by the United States on their behalf.[26] This relinquishment of title resulted from various federal programs which either encouraged nonmember settlement or furthered national public projects. Today, the reservation consists of approximately 2,806,914 acres of which slightly less than half are held in trust for the Tribe. About 1,411,000 acres of non-trust land passed out of trust status as a result of acts of Congress.

The Act of 1889 allotted to individual Indians parcels of land with title in the

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[26]Trust lands are lands allotted to individual Indians and held by the United States in trust for them, see Burke Act of 1906, 34 Stat. 132 (codified at 25 U.S.C. § 349), or held by the United States for the benefit of the Tribe itself.

United States in trust for the allottee for twenty-five years. Following the issuance of fee patents by the Secretary of the Interior of Indian allottees, many of these allotted lands were acquired by nonmembers of the Tribe through sale or inheritance. A large amount of unallotted land considered by Congress to be surplus land was later taken out of trust status as a result of the Act of May 29, 1908, 35 Stat. 460 (1908) (hereafter Act of 1908). This Act allowed nonmembers to homestead the property and claim fee title to lands lying within the reservation boundaries. The Acts of 1889 and 1908 took approximately 1,307,000 acres of reservation land out of trust status.

Congress also acquired certain trust lands for flood control on the Missouri River. The Oahe reservoir was built pursuant to the Flood Control Act of 1944, 58 Stat. 886 (hereafter Flood Control Act). The

United States Supreme Court traced the history of the Flood Control Act in ETSI Pipeline Project v. Missouri, 484 U.S. 495, 108 S. Ct. 805, 98 L.Ed.2d 898 (1988), and noted that it was conceived to remedy two distinct water problems on the Missouri River Basin watershed. South Dakota, like other states in the upper Basin region, experienced difficulties in developing Missouri River water for agricultural and industrial purposes, while states in the lower Basin region experienced seasonal skirmishes with flood control and navigation. Id. at 499.

The Flood Control Act was a compromise between proponents of two comprehensive plans for the project -- the Pick Plan and the Sloan Plan. Among other things, the compromise plan provided for six main-stem reservoirs on the Missouri River. The largest of these, the Oahe Dam and Reservoir Project, would enable "'the irrigation of

750,000 acres of land in the James River Basin as well as . . . provide useful storage for flood control, navigation, the development of Hydroelectric power, and other purposes.'" Id. at 502 (citing S. Doc. No. 247, 78th Cong., 2d Sess., 3 (1944)). Building the Oahe dam and reservoir required the Cheyenne River Tribe to relinquish 104,420 acres of valuable bottomland--"the greatest acreage given up by any tribe to facilitate the construction of a main stem dam on the Missouri River in South Dakota . . . ." Herbert T. Hoover, Professor--Department of History, University of South Dakota, "Cheyenne River Sioux Tribe: Taking Area History," p.1 (Exhibit 93).

III

In the case at bar, the parties filed pre- and post-trial memoranda on the issues to be addressed by the Court. The Court also heard from the United States amicus curiae.

A six-day bench trial ensued wherein the Court heard the testimony of twenty witnesses and received in evidence 267 exhibits. In addition to the factual and procedural background as set forth above, the Court makes the following specific factual findings:

1. About 1,395,729 acres, or 46.5 percent, of the Cheyenne River Reservation is deeded in fee to members and nonmembers. Approximately 3.7 percent of the reservation consists of lands taken by the United States for use by the Oahe Dam and Reservoir Project. The remaining 49.8 percent of the reservation is held in trust with 442,944 acres consisting of individual allotments which remain in trust and 952,782 acres comprising tribal trust lands. The Court makes no finding as to the percentage breakdown of member and nonmember ownership of the deeded lands.

2. The trust lands are interspersed throughout the reservation but are more densely located along the taken area. About two-thirds of the trust lands border the Missouri and Cheyenne Rivers on the eastern and southern boundaries of the reservation.

3. Of the 1980 population of 7,636 persons within Dewey and Ziebach counties, Indians constituted 58 percent and whites constituted 42 percent of that total. 1990 statistics are not yet available nor is there any breakdown as to the population percentages of members and nonmembers on the Cheyenne River Reservation.

4. The Tribe has always asserted jurisdiction over all hunting and fishing activities on the reservation, including nonmember fee lands and the taken area.

5. The Tribe has not acquiesced to any State assertion of jurisdiction over hunting and fishing activities on the reservation.

Beginning with the passage of the Indian Reorganization Act of 1934, 48 Stat. 984, the Tribe enacted ordinances, promulgated under the authority of Article VII of the Tribal By-Laws and approved by the Bureau of Indian Affairs (BIA), which required nonmembers to obtain a tribal permit to hunt or fish on the reservation.

6. Prior to this lawsuit, both the Tribe and the State enforced their respective game and fish regulations on the lands in dispute. The Tribe enforced its regulations against all violators while the State limited its enforcement efforts to nonmembers.

7. No evidence was presented that the Cheyenne River Sioux Tribal Court has imposed criminal sanctions upon a nonmember who violated the tribal game ordinances.

8. The Tribe has the right to graze stock on the taken area subject to the

corresponding use by the United States Army Corps of Engineers.

9. The Tribe exercises its grazing rights according to the terms of its tribal grazing code. This code, approved by the BIA, allows the Tribe to allocate range units to permittees with the grazing permit issued by the BIA. See 25 C.F.R. part 166 (1989). The grazing unit permittee leases only the grass and cannot refuse to allow a tribal member access to the taking area land for reasonable hunting or fishing purposes, though tribal members are encouraged to inform the permittee beforehand of their intended activity. All of the taking area lands within the reservation have been leased.

10. Hunting and fishing for subsistence purposes by members of the Cheyenne River Tribe is an important cultural, social, and religious activity. Lakota tradition exhorts able-bodied tribal members to care for the

needy, weak, and elderly. Not only does subsistence hunting and fishing further that tradition, it honors a fundamental Lakota philosophy of courage, wisdom, and generosity. Hunting and fishing also were necessary to the survival of the early American Indians.

11. Despite the importance to tribal members of hunting and fishing for subsistence purposes, it does not appear that subsistence hunting and fishing is widely practiced by present Cheyenne River Sioux Indians.

12. Tribal regulation of nonmember hunting on the taken area and nonmember fee lands is not necessary to protect hunting by tribal members for subsistence purposes. Deer harvested by nonmember hunters on the taken area and the nonmember fee lands does reduce the amount of deer available to tribal members. This reduction, however, does not decrease subsistence hunting by members as

few deer are harvested by members for subsistence purposes.

13. The State has established that the Tribe itself, in setting licensing fees and season limits, places greater management emphasis on recreation hunting than on subsistence hunting. The tribal wildlife management program does not monitor subsistence hunting nor has the Tribe ever closed a season with the stated purpose of assuring adequate subsistence hunting as opposed to assuring adequate recreational hunting by tribal members.

14. Only a small amount of hunting by tribal members is conducted for subsistence purposes, therefore, hunting activities of nonmembers on the taken area and fee lands would not make it more difficult for tribal members to successfully subsistence hunt on the reservation.

15. The past subsistence needs of tribal members have been met despite nonmember hunting on the taken area and fee lands. Indeed, often more big game and small game tribal licenses were sold to nonmembers than to members. Thus, the taken area and fee lands are not substantial food sources for tribal members.

16. Tribal regulation of nonmember fishing on the shoreline of the taken area is not necessary to protect fishing by tribal members for subsistence purposes. The State proved that subsistence fishing by members on the taken area is not a substantial source of food for tribal members.

17. Tribal lands contribute to the well-being of the deer herds on the taking area and on nonmember fee lands. Virtually all the land adjacent to the taking area is trust land. As a white tail deer may move up to twelve miles across its home range, all

reservations lands, whether trust, deeded or public, sustain deer populations. An effective state or tribal wildlife management program necessarily must encompass the entire reservation.

18. Generally nonmembers hunting and fishing on the reservation have conducted themselves in a manner that does not threaten the legitimate tribal concerns for livestock grazing and protection of other property. Although nonmembers may have harassed cattle grazing on the taken area or on tribal lands, failed to close pasture gates, or let down wires on fences, this conduct has not been so extreme and pervasive as to warrant extraordinary enforcement efforts by state or tribal game officers. Hunting and fishing by members on these lands has resulted in many of the same unlawful or improper acts towards the personal property of landowners and grazing permittees.

19. Federal agencies like the BIA, the U.S. Fish & Wildlife Service, and the U.S. Army Corps of Engineers cooperate with state and tribal governments in promoting fish and wildlife conservation and public recreation. For example, federal funds are made available through the Dingell-Johnson Act, 16 U.S.C. § 777 (1989), the Endangered Species Act, 16 U.S.C. § 1531, and the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 450 et seq. (1975) (hereafter Indian Self-Determination Act). South Dakota, through its Pheasants for Everyone program, complements the Conservation Reserve Program, 7 C.F.R. part 704 (1990), of the Agricultural Stabilization and Conservation Service by contracting with farmers to grow wildlife food plots on idled CRP land.

20. Neither the State nor the Tribe can lay claim to a program of wildlife management without crediting federal agencies with some financial and management assistance. Moreover, federal assistance is not an intimation of regulatory jurisdiction.

21. The economic security of the Cheyenne River Tribe would not be threatened if prohibited from regulating the hunting and fishing activities of nonmembers on the deeded lands and taken area. Although the Tribe has regulated nonmember sportsmen on the reservation, it has not been successful in developing a recreational hunting and fishing industry that would generate revenues to defray the cost of a large-scale management program. Preservation and development of tribal resources is carried out primarily by enforcement of tribal regulations.

22. In the 1930's and the 1940's the Tribe had made significant inroads into wildlife management. Notwithstanding its earlier success, inadequate funding has prevented the tribe from sustaining an independent and vigorous scheme of wildlife management on the reservation. Certain management activities of the Tribe, like fish stocking and exchange programs, have been limited and little documentation exists since 1984.

23. Until 1989, no ongoing fish or wildlife surveys for the collection of harvest and population date were conducted by the tribal game, fish and parks department. Also, the Tribe had no established conservation, depredation, or stocking programs to protect and enhance existing fish and wildlife resources.

24. A single wildlife biologist employed by the Aberdeen-area BIA was available to advise and assist the tribe. This biologist also

serves fourteen other reservations in three states, all under the administration of the Aberdeen-area BIA office. Except for the BIA wildlife biologist, tribal conservation personnel have little or no background in biology or wildlife management. For example, training courses in wildlife management for tribal game wardens were virtually nonexistent before 1989. As a result, the tribal council has had to rely upon estimates and recommendations of state game officials in setting bag and season limits.

25. In 1989, the Tribe contracted for wildlife biologist and management consultant services with Lower Brule Wildlife Enterprise. Funding for assistance in developing a wildlife management program was requested by the Tribe prior to November 1988 and later was provided by the Department of the Interior pursuant to a P.L. 638 contract with the Tribe.

26. The tribal wildlife management program written by the contract biologist service employs scientific data collection and management techniques. The reservation-wide program seeks to maximize annual harvestable surpluses to meet the present and future economic, recreational, and aesthetic needs of tribal members. No data compilations or reports are available yet to gauge the program's strengths and weaknesses, nor is there any evidence as to the successful implementation of the new wildlife management plan.

27. After the needs of tribal members have been met, the tribal wildlife program provides for consumptive and non-consumptive opportunities for others.

28. The Tribe has been unsuccessful in developing the Oahe fishery. Little revenue is raised by the sale of fishing licenses to nonmembers and other fishing-related

development, i.e., campgrounds, resorts, tourist attractions, baitshops and novelty items, is virtually nonexistent.

29. The State of South Dakota implemented a comprehensive wildlife regulatory program in the early years of its statehood. The function and structure of the South Dakota Department of Game, Fish and Parks has expanded to serve changing public and environmental demands since that time.

30. Recreational hunting generates revenues sufficient to justify substantial expenditures for South Dakota's wildlife management program.

31. The State has a large staff of highly educated and experienced wildlife conservation personnel. The wildlife surveys for the area are comprehensive scientific tools for monitoring harvest and population data. State programs for habitat improvement, depredation control, and

wildlife conservation, including pervasive law enforcement measures and field-level recommendations by conservation officers, have been successful in promoting manageable wildlife populations in Dewey and Ziebach counties.

32. Fisheries management is an integral part of the State's general recreation plan. Lake Oahe boasts of a spawning and imprint station above the dam in the Whitlock reservoir. Walleye and northern pike fishing in the Lake Oahe area are recognized as among the best in the nation. South Dakota stocked the Oahe area with approximately 72 million fish during the period from 1970 to 1988, including a wide array of sport fishing species like rainbow trout, smallmouth bass, walleye, and chinook salmon. Fish stocking studies monitor the success of a particular stocking effort. The State conducts fish population surveys for use in determining its

fishing regulations as well as studies to determine fishing pressure, catch rates and harvest information on the lakes on the Missouri River. Numerous other studies and surveys monitor particular aspects of fisheries management on Lake Oahe. In addition, the State submits annual Missouri River water level recommendations to the Corps of Engineers with the goal of improving recreational fishing and protecting endangered species. Enforcement of fishing regulations also furthers fisheries management. Finally, South Dakota invests a substantial sum of money, along with joint funding from various federal programs, in developing its recreational fishery on Lake Oahe. In return for its investment, the State generates substantial revenue through the sale of licenses and through enhanced tourism.

33. Neither the taken area nor the fee lands constitute a pristine area. The Tribe has never denied general nonmember access to the taking area or fee lands nor does the Tribe monitor nonmember access to the taken area or fee lands. In addition, there has been no showing by the Tribe that unique cultural, spiritual, or religious significance attaches to the taken area or the fee lands.

34. The Tribe has no general scheme to define the essential character of the reservation lands. Nonmember fee lands are interspersed throughout the reservation in a checkerboard fashion. The reservation consists primarily of range and farm land. There is little industrial development and only a few sparsely populated communities.

35. The Tribe discriminates against nonmembers in the application of its hunting and fishing programs. Discrimination in setting season limits is most obvious in the

deer seasons with restrictions upon nonmembers regarding season closings and deer type, sex and age that are not applicable to member hunters.

36. The tribal game, fish and parks department sets licensing fees and season limits without regard to member subsistence hunting and in a manner which discriminates against nonmembers. The discriminatory licensing fees apply to nearly every animal hunted or trapped on the reservation. These restrictions apply whether the lands being hunted are trust, deeded or public lands.

37. The State hunting program, on the other hand, does not discriminate against Indian or nonmember hunters in setting fees and season limits. In addition, state conservation programs, like the Pheasants for Everyone program and the predator program, encourage participation by both members and nonmembers.

38. The State does not discriminate against members or nonmembers fishing on the Missouri River. State fish stocking efforts include rivers that run through the reservation.

39. The Cheyenne River Tribe's political integrity will not be diminished as it still retains exclusive regulatory jurisdiction over the trust land and regulatory jurisdiction over its members throughout the reservation.

40. In sum, the Tribe need not regulate the hunting and fishing activities of nonmembers on the taken area and the nonmember fee lands to protect its political integrity, economic security, or health or welfare.

ISSUES

The following issues are presented by the record in this case:

I. Did the Tribe threaten impermissible criminal sanctions against those nonmembers who

violate the tribal licensing regulations?

II. Were the Cheyenne River Reservation boundaries disestablished as a result of the Act of 1908 and the Cheyenne River Act?

III. Does the Tribe have civil jurisdiction to regulate hunting and fishing by nonmembers on the taken area and nonmember fee lands?

DISCUSSION OF ARGUMENTS AND AUTHORITIES

I

The Court first turns to the question whether enforcement of the tribal game ordinance would include the imposition of criminal sanctions against nonmembers. A tribe's criminal jurisdiction over its members is "part of retained tribal sovereignty, not a delegation of authority from the Federal Government." Duro v. Reina, 110 S. Ct. at 2060; see also United States v.

Wheeler, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978). The opposite is true in relations with nonmembers, though, because tribes lack the power to prescribe and enforce rules of conduct against nonmembers through criminal sanctions. As sovereigns dependent upon the dominant political will of the federal government, "Indian tribes . . . necessarily give up their power to try nonmember citizens of the United States except in a manner manner acceptable to Congress." See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978). Thus Congress must affirmatively delegate to a tribe criminal jurisdiction over nonmembers. Id. Inasmuch as Congress created federal criminal jurisdiction over offenses committed by nonmembers in Indian country, which includes all land within the limits of the reservation, no grant of criminal authority

over nonmembers exists in the tribes. 18 U.S.C. §§ 1151 et seq. Indian tribes must look to Congress or the states for prosecution of crimes committed by nonmembers upon Indian lands. See Duro, 110 S. Ct. at 2057 n.1; Public Law 280, Act of Aug. 15, 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §1360) (hereafter P.L. 280).

In this action South Dakota seeks to prohibit the tribal defendants from asserting criminal jurisdiction over nonmembers who are in violation of tribal licensing regulations. This Court previously declined to dismiss this count of the complaint on the grounds that its disposition should await the parties' factual presentation. Having reviewed the briefs on the motion for dismissal and having heard the testimony at trial, this Court concludes that the State's first count must be dismissed for lack of a

justiciable case or controversy under Article III of the U.S. Constitution.

Throughout this litigation the tribal defendants have disavowed any criminal jurisdiction over nonmembers, claiming that the available sanctions are purely civil in nature. The State, on the other hand, asserts that tribal enforcement of its hunting and fishing code will be accomplished through impermissible criminal sanctions. However that may be, this Court cannot speculate as to whether tribal enforcement of its game ordinances will be accomplished through civil or criminal sanctions when no actual conflict has been presented by the State.

The tribal defendants raise the specter of National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985), for the proposition that scrutiny of the enforcement provisions of the game ordinance rests

initially with the tribal court. Indeed, National Farmers supports this position, saying:

> . . . [T]he existence and extent of a tribal court's jurisdiction will require will require a careful examination of tribal sovereignty . . . .
>
> * * *
>
> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.

Id. at 856.

According to the evidence presented at trial, the Cheyenne River Sioux Tribe Court has never imposed criminal sanctions upon nonmember transgressors. Moreover, a recent decision of the Tribal Court unequivocally limits tribal enforcement over nonmember hunting and fishing activities on the

reservation "by means of civil ordinances and laws . . . ." Cheyenne River Sioux Tribe v. Key, slip op. at 4 (Cheyenne River Sioux Tribal Court filed Jan. 31, 1990). Without commenting on the source of authority upon which the Tribal Court relies in reaching its conclusion, the decision ultimately restricts tribal sanctions against nonmembers to those generally recognized as civil in nature.

The tribal enforcement provisions do not establish a brightline between the available civil and criminal penalties. But, until this Court is called upon to determine whether an actual judgment of the Tribal Court exacts a criminal rather than a civil penalty against a nonmember violator of the tribal game ordinance, this purported controversy lacks "sufficient immediacy and reality." Granville House, Inc. v. Department of H.E.W., 772 F.2d 451, 455 (8th Cir. 1985), appeal after remand, 796 F.2d

1046 (1986), vacated, 813 F.2d 881 (1987). See also, Rincon Band of Mission Indians v. County of San Diego, 495 F.2d 1, 6 (9th Cir. 1974); Hodel v. Irving, 481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987). Dismissal of the State's first prayer for relief therefore is warranted at this time.

II

The second issue to be addressed by the Court is whether Congress has altered the reservation boundaries thereby depriving the Tribe of jurisdiction over nonmember activities on the disestablished lands. Subject to certain limitations, a tribe can exercise civil regulatory authority over conduct that takes place only on its reservation. If Congress has disestablished the reservation boundaries and has not reserved tribal regulatory authority, the tribe has no jurisdiction over Indian or nonmember activities on the disestablished

portion. But, if no disestablishment has occurred, "treaty-established jurisdiction would preempt the application of state . . . laws on the reservation, . . . except to the extent that the Tribe's rights have been abrogated by subsequent congressional action." Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 815 (8th Cir. 1983), cert. denied, 464 U.S. 1042, 104 S. Ct. 707, 79 L. Ed. 2d 171 (1984) (citing Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977); DeCoteau v. District County Court, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975)).

Other courts, including the United States Supreme Court, frequently have addressed disestablishment questions of this nature. An intention to disestablish reservation boundaries is not lightly imputed to Congress. Instead, Congress must affirmatively alter established reservation

boundaries in unmistakable terms. See Rosebud Sioux Tribe v. Kneip, 430 U.S. at 586; DeCoteau v. District County Court, 420 U.S. 444; Lower Brule Sioux Tribe v. South Dakota, 711 F.2d at 815-16. The "face of the Act" or "the surrounding circumstances and legislative history" must be examined to divine Congress' intent. Mattz v. Arnett, 412 U.S. 481, 505, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973). Finally, "traditional solicitude for the Indian tribes" directs that any legislative ambiguity or doubtful expressions of disestablishment must be resolved in their favor. See Solem v. Bartlett, 465 U.S. 463, 472, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984).

A

The United States Supreme Court held in Solem v. Bartlett, supra, that the Act of 1908, which opened to settlement 1.6 million acres of surplus or unallotted lands in the

Cheyenne River Reservation, did not affect the original reservation boundaries established by the Act of 1889. Bartlett, 465 U.S. at 481. See also United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated and remanded on other grounds, 446 U.S. 980, 100 S. Ct. 2959, 64 L. Ed. 2d 836 (1980); United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977); and United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973). The Bartlett Court held that Congress did not expressly state that the allotment would result in a disestablishment of the original boundaries and that neither the legislative history nor any later congressional action clearly indicates such a disestablishment. Bartlett, 465 U.S. at 481. Because reservation lands owned in fee by nonmembers passed to them directly or indirectly as a result of the Act of 1908, the Tribe may have

civil jurisdiction on the deeded lands within the originally-established boundaries.

B

Moreover, there is no "substantial and compelling evidence of a congressional intent to disestablish Indian lands" taken as a result of the Act of September 3, 1954, Pub. L. No. 83-776, 68 Stat. 1191 (hereafter Cheyenne River Act). See Bartlett, 465 U.S. at 472. On this issue, the Court finds instructive the Eighth Circuit Court of Appeals' opinion in Lower Brule Sioux Tribe v. South Dakota, supra. An examination of the takings accomplished by the Big Bend Act, Pub. L. No. 87-734, 76 Stat. 698 (1962), and the Fort Randall Act, Pub. L. No. 85-923, 72 Stat. 1773 (1958) [sister Acts to the Cheyenne River Act], led the appeals court to conclude that no disestablishment of the Lower Brule Indian Reservation had occurred. See Lower Brule, 711 F.2d at 821.

Like the Big Bend and Fort Randall Acts, the Cheyenne River Act was one of seven taking statutes enacted to compensate the tribes and their members for Flood Control Project lands taken by the Corps of Engineers. Id. at 813 n.1 (citations to Acts). Lower Brule held that despite Congress' use of the words "as diminished" in four of the taking statues when referring to the reservation -- including the Cheyenne River Act -- no congressional intent to disestablish was found in the Big Bend and Fort Randall Acts. Lower Brule attributed the different wording found in the statutes to diverse formats and drafting styles rather than evidence of a variation in congressional intent. Id. at 821 n.13. Significantly on this point, the Eighth Circuit stated:

> . . . the district court's conflicting conclusions on the disestablishment question with regard to the Fort Randall and Big Bend Acts imputes to Congress a

> very impractical and unlikely purpose with respect to flood control on the Missouri River. If the court below was correct, it would mean that in acquiring the land necessary for the comprehensive Missouri River Basin Project through the seven taking statutes, . . . Congress in the first Act . . . and the last two Acts . . . preserved existing reservation boundaries, but in the middle four Acts . . ., by inclusion of the words "as diminished," it did not do so. There simply is no indication that Congress intended to create such an unusual and impractical result.

Id. at 820-21.

South Dakota nevertheless asserts that the Cheyenne River Act expressly disestablished the reservation. In relevant part, § 11 of the Cheyenne River Act states as follows:

> . . . . The lands so selected and purchased as substitute allotments may be either within the boundaries of the Cheyenne River Reservation as diminished by this agreement or outside said reservation as may meet the desires of the individuals involved in the several transactions.

68 Stat. 1191, § 11 (emphasis supplied).

Conceded that in the light of Solem and Lower Brule this statement by itself does not satisfy the "unmistakable terms" requirement for a disestablishment, the State contends that other provisions of the Cheyenne River Act in combination with the above-quoted sentence lead to a conclusion that Congress clearly intended a disestablishment of the reservation. Notably, § 1 of the Cheyenne River Act provides that the Tribe:

> . . . does hereby convey to the United States all tribal, allotted, assigned, and inherited lands or interests within said Cheyenne River Reservation belonging to the Indians of said reservation . . . .

68 Stat. 1191, § 1.

According to the State, the Tribe's transfer of all title and interest in the project lands to the federal government worked a disestablishment of the reservation along the taken line of the Missouri River.

South Dakota's interpretation of § 1, however, is incompatible with later sections of the Cheyenne River Act which expressly reserve in the Tribe specific rights and interests in the taken lands. For example, § 6 provides for the Tribe's retention of mineral rights in the taking area. Section 7 reserved the right to cut and remove timber from the taken area. Finally, § 10 provides that tribal members shall have grazing rights in the taking area and "the right of free access to the shoreline of the reservoir, including the right to hunt and fish in and on the aforesaid shoreline and reservoir[.]" In sum, a conveyance to the United States of all of the Tribe's interests in the project lands is not a clear expression of disestablishment of the reservation boundaries when followed by a litany of reserved rights and privileges.

Moreover, § 2 of the Cheyenne River Act provides for a sum certain to be paid to the Tribe, "in final and complete settlement of all claims, rights, and demands of said Tribe or allottees[.]" 68 Stat. 1191, § 2. The Eighth Circuit twice has ruled that a nearly identical provision fell short of a clear expression to alter a reservation's boundaries. See Lower Brule, 711 F.2d at 816-17, 819; United States v. Wounded Knee, 596 F.2d 790 (8th Cir.), cert. denied, 442 U.S. 921, 99 S. Ct. 2847, 61 L. Ed. 2d 289 (1979). With little discussion, the Appeals Court concluded that "[t]his language falls short of that utilized by Congress when it has unequivocally expressed its intent to disestablish a reservation's boundaries." Such brevity is compelling and, in this case, correct. Far from a clear expression of intention to disestablish reservation boundaries, the face of the Cheyenne River

Act is ambiguous, and at best equivocal, on this subject.

The Act's legislative history does not evince a congressional intention to alter reservation boundaries. The "as diminished" language of § 11 received identical treatment by the Senate and House Committees on Interior and Insular Affairs. The report of the House Committee provided simply that the "lands so purchased as substitute allotments may be either within or without the boundaries of the Cheyenne River Reservation", entirely omitting the "as diminished" language of the bill. H.R. Rep. No. 2484. 83d Cong., 2d Sess. 8. A report of the Department of the Army, which was included in the Committee Report, did not even discuss § 11. Id. at 9-12. The attached report of the Secretary of the Interior, however, included the "as diminished" phrase when it recommended that

substitute allotments be conveyed in "restricted fee" to the individual Indians. Id. at 14. Yet that report does not elaborate on the disestablishment of reservation boundaries.

In the Senate, the report of the Committee on Interior and Insular Affairs also omitted the "as diminished" language of § 11 in its sectional analysis of the bill. See S. Rep. No. 2489, 83d Cong., 2d Sess. 5. And the reports of the Secretary of the Interior and the Department of the Army run true to form with their reports to the House Committee. Id. at 8, 9-12. Significantly, though, all the committee reports do not elaborate on the effect of the Cheyenne River Act upon the reservation boundaries. In sum, the legislative history of the Cheyenne River Act reflects little, if any, treatment of the disestablishment question.

Finally, circumstances surrounding the taking of the reservation lands do not support a finding of disestablishment. Before it could be effective, § 1 of the Cheyenne River Act, included at the behest of the Tribe, required strict observance of Article 12 of the Treaty of April 29, 1868. Article 12 requires a three-fourths vote of approval by tribal members before any cession of reservation lands can be valid and enforceable against them. The following excerpt from a Memorial presented by the Tribe to Congress, conveyed its concerns if the Cheyenne River Act was not ratified by the required number of votes:

> If we should now abandon our insistence that three-quarters of the adults ratify the Act which results from the Oahe bills, we would be abandoning our own Treaty. We would be consenting to a violation of Article XII of that Treaty. It would be a shameful thing for us, as one of the divisions of the Sioux Nation, to abandon and break Article XII of

> the 1868 Treaty. We have for so many years insisted and still are insisting that the 1868 Treaty and Article XII thereof govern our land claim. From our side we do not wish to be branded as traitors by the people of the Reservations who live by and under the Treaty of 1868.
>
> But what about the Government of the United States? Does the Department of the Interior wish to have conveyed part of the title or a questionable title or an invalid title? Does the Interior Department wish to lay the basis for future litigation? . . .

Memorial to the 83rd Congress in regard to Oahe Project South Dakota, S. 695 and H.R. 2233, presented by the Negotiating Committee of the Cheyenne River Sioux Tribal Council, 3-4 (May 20, 1954) (see Hearing before the Joint Senate-House Committee on Interior and Insular Affairs, S. Doc. No. 695, H.R. Doc. No. 2233, 83rd Cong., 2d Sess. 215 (May 20, 1954)) (hereafter Tribal Memorial). Congress acquiesced and the Cheyenne River Act was later approved by 92 percent of the voting tribal members.

The Tribal Memorial points to a desire on the part of the Tribe to finally and completely convey to the United States those lands required for the Oahe Reservoir. The tribal vote does not, however, express unmistakably a desire to alter existing reservation boundaries. The fact that the Tribe voted to convey limited title to lands necessary for the federal project does not positively denote a relinquishment of tribal jurisdiction over those lands. "Congressional action removing certain reservation land from Indian ownership does not necessarily disestablish reservation boundaries." Lower Brule, 711 F.2d at 815. A change in reservation boundaries, therefore, is not imperative to diminishing the land size of a reservation. See Condon v. Erickson, 478 F.2d at 688.

In its discussion of § 11, the Tribal Memorial makes clear that the Tribe did not

contemplate the disestablishment of reservation boundaries as a result of the takings. The Tribe understood that the Interior Department was "endeavoring to terminate the trust status of a very large body of land" within the reservation. Tribal Memorial at 24. The Tribe's only concern was with the continued trust status of substitute allotments and not with the possible disestablishment of its reservation boundaries. Ostensibly, then, the disestablishment issue did not even command the attention of the Tribe itself, which says something of its prominence in the formation of the Oahe bills to be voted upon.

The Cheyenne River Act did not disestablish the Missouri River boundary of the Cheyenne River Reservation. The face of the Act itself is not "'precisely suited' to evince Congress' intent to disestablish reservation boundaries." Lower Brule, 711

F.2d at 816. Nor do the legislative history of the Act and the circumstances surrounding its passage and implementation point unmistakably to the conclusion that Congress intended to exclude the taking area from the Cheyenne River Reservation. Id. at 815.

III

The last issue to be resolved is whether the Tribe has the authority to regulate hunting and fishing by nonmembers on lands owned by nonmembers or the United States but which lie within the boundaries of the reservation. The following discussion of general Indian law principles leads this Court to conclude that tribal civil jurisdiction does not reach the hunting and fishing activities of nonmembers on the fee lands or taken area.

A tribe's powers in relations between it and its members upon its territory are akin to those of a sovereign nation. See United

States v. Wheeler, supra. The powers of a tribe in relations between it and nonmembers are diminished, however, because of its dependence upon the federal government. The tribe as quasi-sovereign is divested of any inherent power to exercise criminal jurisdiction over nonmembers. Duro v. Reina, 110 S. Ct. 2053, 58 U.S.L.W. at 4645; Oliphant, 435 U.S. at 212. Although the tribe's civil jurisdiction over nonmembers is not so divested, its power to regulate generally the conduct of nonmembers on reservation lands no longer held by or for the benefit of the tribe or its members is greatly diminished. See Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. ---, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989) (plurality opinion); Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981); United States v. Anderson, 736 F.2d 1358 (9th Cir.

1984). The United States Supreme Court has identified three situations in which the exercise of tribal civil jurisdiction over nonmembers on non-tribal land may be appropriate: (1) where Congress has expressly delegated jurisdiction to the tribe; (2) where a nonmember has essentially consented to tribal jurisdiction through a business relationship or otherwise; and (3) where the conduct of the nonmember imperils the tribe's political integrity, economic security, or health and welfare. Id.

To rule on the case as pleaded first requires that the Court dispose of two side issues raised in the briefs. Initially, this Court need not engage in a lengthy abrogation analysis as was required of the Eighth Circuit in Lower Brule. See Lower Brule, 711 F.2d at 821-27. The district court in Lower Brule erroneously concluded that South Dakota possessed exclusive jurisdiction to regulate

hunting and fishing by all persons within the Fort Randall and Big Bend taking area. See Lower Brule Sioux Tribe v. South Dakota, 540 F. Supp. 276, 287 (D.S.D. 1982), rev'd, 711 F.2d 809 (8th Cir. 1983). The basis for this conclusion was that a disestablishment of the Lower Brule reservation had occurred and that tribal jurisdiction over hunting and fishing by tribal members had been abrogated by Congress. But this Court has not been called upon to decide whether the Tribe has regulatory jurisdiction over hunting and fishing by tribal members on the taken area and on nonmember fee lands within the reservation. Although the State raised that issue in its trial brief, the State's complaint asks only that the Court declare the extent of tribal jurisdiction as it affects nonmembers on the lands in dispute.

Second, the question of state jurisdiction on the taken area or fee lands

has been raised in the briefs and orders of the Court. However, the State, limited to its complaint, has not asked this Court to decide whether South Dakota has jurisdiction over nonmember hunting and fishing on the taken area and nonmember fee lands. The tribal defendants succinctly stated the limits of the Court's inquiry:

> It is important to note that this case does not involve the question of whether the state may also have jurisdiction over non-Indian activities on the taking area and deeded lands. The state, of course, is the plaintiff in this case. Its complaint seeks only to prohibit the exercise of tribal jurisdiction, not to establish the existence of state jurisdiction. . . . Nor did the tribal defendants counter claim for such relief. . . . Thus the pleadings in this case are insufficient to raise the question of whether the exercise of state jurisdiction on the reservation lands is preempted by tribal jurisdiction. That is how the parties tried the case as well. The state, for example, made no attempt to show how its interests would be injured if the tribe were to exercise exclusive jurisdiction

> over the areas in dispute. Similarly, the evidence presented by the tribal defendants was aimed at demonstrating the need for tribal jurisdiction and not whether state jurisdiction should be precluded because it interferes with the achievement of tribal and federal objectives.

Tribal Defendants' Post Trial Memorandum, p. 5 (February 26, 1990).

The State disagrees with this statement. This Court, however, concludes that this case does not involve issues of preemption or tribal regulatory authority over nonmembers on tribal lands. See, e.g., Cotton Petroleum Corp. v. New Mexico, 490 U.S. ---, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 130 S. Ct. 2378, 76 L. Ed. 2d 611 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980); Ramah Navajo School Bd., Inc. v.

Bureau of Revenue of New Mexico, 458 U.S. 832, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982). Thus, the Court's attention turns to the single question before it: whether the Tribe can regulate hunting and fishing by nonmembers within the taken area and upon nonmember fee lands.

A

The United States Supreme Court previously has addressed the issue whether a tribe has authority to regulate hunting and fishing by nonmembers on nonmember fee lands within the reservation. Montana v. United States, supra, involved a claim by the Crow Tribe of Montana that it, and not the state, had the authority to regulate hunting and fishing by nonmembers on non-Indian lands within reservation boundaries. In holding for the state, the Montana Court articulated a presumption that the relational law of the federal government and Indian tribes provides

that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[27]

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[27]Termed the "implied limitations doctrine." this tenet posits that retained sovereign powers of the Indian tribes were limited but not abolished as a result of their dependence on the United States. See F. Cohen, Handbook of Federal Indian Law 231 (1982 ed.). Certain retained powers were explicitly divested by treaty or congressional act. See Note, Tribal Power to Zone Nonmember Land Within Reservations: The Uncertain Status of Retained Tribal Power Over Nonmembers, 21 Ariz. St. L.J. 769, 774-79 (1989). Other powers were implicitly divested, however, as inconsistent with the dependent status of tribes. Cf. Oliphant, supra. Generally, inconsistent powers are those involving the external relations of a tribe. See, e.g. United States v. Wheeler, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978); Knight v. Shoshone & Arapaho Tribes, 670 F.2d 900 (10th Cir. 1982); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982). Thus, Montana has not been applied by the Supreme Court in cases involving tribal

(Footnote Continued)

Montana, 450 U.S. at 564. See also Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973); Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973); United States v. Kagama, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886) (United States may govern tribes within the geographical boundaries of the Nation by acts of Congress rather than controlling them by treaties).

The United States Supreme Court is divided over the issue whether Montana reverses traditional Indian law principles by

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(Footnote Continued)
sovereignty over tribal members on tribal land, i.e., matters of internal relations. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987).

establishing a presumption that tribes lack civil jurisdiction over nonmembers unless such authority is affirmatively delegated by Congress. This division was apparent in the Court's recent opinion in Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, supra. In the separate opinions of Justices White and Blackmun, the presumption issue surfaced when both sought to clarify Congress' role in authorizing tribal regulatory jurisdiction over nonmembers.

As the author of the decision of the Court as to the "open area," Justice White relied on Montana and Wheeler as support for the principle that, where "[a]n Indian tribe's treaty power to exclude nonmembers of the tribe from its lands" has been abrogated, Congress must affirmatively delegate to the tribe civil jurisdiction over nonmembers for such authority to exist. Brendale, 109 S.

Ct. at 3006. Implicit divestiture of authority follows as "regulation of 'the relations between an Indian tribe and nonmembers of the tribe' is necessarily inconsistent with a tribe's dependent status . . . ." Id.

Joined in his opinion by only two other members of the Court, Justice Blackmun argued that Justice White's reading of the "general principle" fashioned in Montana ignores a longstanding presumption which retains tribal civil jurisdiction to regulate nonmember conduct on the reservation. Id. at 3018. Justice Blackmun wrote, "'Civil jurisdiction over . . . activities [of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.'" Id. at 3020 (citing Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987)).

Justice Blackmun stated, however, that "to recognize that Montana strangely reversed the otherwise consistent presumption in favor of inherent tribal sovereignty over reservation lands is not to excise the decision from our jurisprudence." Brendale, 109 S. Ct. at 3021. The case still protects "significant tribal interests" which are "threatened or directly affected" as a result of on-reservation conduct by nonmembers. Id. at 3022. Therefore, Montana's misreading of Indian-law jurisprudence is, in effect, offset by its solicitude for sovereignty jurisprudence. Id.

The effect of these opinions on Montana is unclear, and the opinion of Justice Stevens does little to clarify the discussion. Justice Stevens, who delivered the opinion of the Court in Brendale as to the "closed area," asserted that the power to exclude nonmembers from reservation lands

includes the lesser power to determine the essential character of the area through land use regulation. Brendale, 109 S. Ct. at 3010. Derived from inherent Indian sovereignty and rights guaranteed it by treaty, a tribe's exercise of its power to define the character of the tribal community may entail the regulation of nonmember activities on lands owned by them. Id. Although the "unadulterated character" of the closed area required tribal zoning authority over nonmembers, Justice Stevens concluded that the tribe had no similar interest in the open area. Id. at 3015.

Justice Stevens focused on the zoning authority context of Brendale and distinguished Montana on its facts. Montana did not "require a different result" because in that case the hunting and fishing regulation discriminated against nonmembers, the nonmembers' conduct did not threaten the

welfare of the tribe, and the state had significant ownership and management interests in the property where the nonmember activity would be carried out. Id. at 3014.

In short, Montana remains viable case law precedent. With this in mind, Montana cannot be distinguished from the facts of this case. This case does not involve land use regulation, i.e., zoning, whereby the purported use of the property by the nonmember would be different than that of any tribal member generally -- both members and nonmembers use the taken area and fee lands for hunting and fishing. This Court found that nonmember hunting and fishing activities pose no more threat to grazing livestock than does the similar conduct of tribal members. The Tribe's licensing regulations are discriminatory, preferring the needs of tribal members before those of nonmembers, both in the issuance of licenses and the fees

charged. In addition, the Court found that the present dispute does not concern lands which, if severed from tribal control, would corrupt a uniquely Indian community. Finally, a significant portion of the reservation is owned by nonmembers and the United States. This Court, in looking to federal law as a source of regulatory jurisdiction, must apply the "general principle" propounded in Montana: unless Congress expressly delegated civil jurisdiction to the Cheyenne River Tribe over nonmember hunting and fishing on the taken area and the nonmember fee lands, no such authority exists in the Tribe. Montana, 450 U.S. at 564. Cf. Application of Otter Tail Power Co., 451 N.W.2d 95, 101 (N.D. 1989) (examined Brendale and applied express congressional delegation analysis).

Article 2 of the 1868 Fort Laramie Treaty granted the Cheyenne River Tribe the "absolute and undisturbed use and occupation" of the territory reserved for it by Congress. This treaty further granted a tribal right to exclude nonmembers from its reservation and, implicitly, to "define the essential character" of the tribal community. See Brendale, 109 S. Ct. at 3010 (opinion of Justice Stevens). But Congress later championed other national interests by enacting legislation which encroached upon the Tribe's right to exclusively use and occupy its reserved territory. In advancing its allotment policy[28], Congress passed the Act of 1889 which made it possible for lands

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[28] See General Allotment Act of 1887, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331 et seq.); Solem v. Bartlett, 465 U.S. 463, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984).

originally allotted to tribal members to eventually pass by sale or inheritance to nonmembers. Yet the Act retained the reservation status of alienated land. See Mattz v. Arnett, supra. See also Note, Undermining Tribal Regulatory Authority: Brendale v. Confederated Tribes, 13 U. Puget Sound L. Rev. 349 (1990). Thirty years later Congress further diminished tribal ownership of reservation lands when it passed the Act of 1908 and opened unallotted or surplus lands to non-Indian homesteading. Finally, more reservation lands were taken along the Missouri River by the United States pursuant to the Flood Control and Cheyenne River Acts. As a result, the Tribe could no longer exclude any person from lands owned by nonmembers or the United States.

A final consequence of each of these Acts was to alienate certain lands from the Tribe for the benefit of nonmember settlers

or for the United States. As was made clear in Montana:

> . . . treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands. Accordingly, the language of the 1868 [Fort Laramie] treaty provides no support for tribal authority to regulate hunting and fishing on land owned by the non-Indians.

Montana, 450 U.S. at 561. See also Brendale, 109 S. Ct. at 3003-04 (Justice White's discussion of Yakima Treaty of 1859).

The Act of 1908 reserved for the Cheyenne River Indians "any benefit to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act." 35 Stat. 464, § 9 (emphasis supplied). But, because the Tribe alienated certain reservation lands pursuant to the allotment policy regulatory power in the Tribe over those lands now held in fee by nonmembers would be inconsistent with the Act. The 1868 Fort Laramie Treaty did not

grant the Tribe civil jurisdiction over hunting and fishing on land owned by nonmembers. Dispositive of the nonmember fee lands issue is the fact that nowhere in the Act of 1908 does Congress expressly delegate to the Tribe the authority to regulate hunting and fishing by nonmembers on allotted lands.

2

Turning to the taken area, the avowed purpose of the Cheyenne River Act was the acquisition of those lands necessary for the construction of the Oahe Dam and Reservoir Project, not, as was the goal of the Act of 1908, "the ultimate destruction of tribal government." Montana, 450 U.S. at 506 n.9. The Cheyenne River Act dealt primarily with payment to the Tribe for damages resulting from the flooding of its valuable bottomlands. The sum of $10,644,014 was appropriated in payment for the taken lands

and interests therein. Including loss of wildlife, grazing permit revenue loss, the rehabilitation of all tribal members, the relocation and reestablishment of the displaced tribal members, and the cost of negotiating the agreement. 68 Stat. 1191, §§ 2, 5, and 13. Other unspecified sums were to be appropriated for the relocation of cemeteries and the relocation and reconstruction of Cheyenne River Agency, hospitals, schools, and other public buildings and roads. Id. at §§ 3-4.

Federal damages relief commanded the lion's share of the debate and the negotiations. An appraisal made by Gerald T. Hart and Associates (hereafter Hart appraisal) concluded that the Oahe Dam and Reservoir Project would require the taking of 104,420 acres of the Cheyenne River Reservation at a fair market value of $1,605,410. The Hart appraisal was

unacceptable to both the Department of the Interior and the Tribe and negotiations ensued to reach an agreement of the value of the land and interests to be conveyed. See S. Rep. No. 2489, 83rd Cong., 2d Sess. 3. Subsequent hearings before the Senate and House Committees, and negotiations with the Corps of Engineers, the Missouri River Basin investigation staff, and a delegation from the tribal council concentrated on the issue of damages, without discussion of tribal authority over nonmember activities on the taken area. See generally House of Representatives, Hearings Before the Committee on Interior and Insular Affairs, Joint Senate and House Subcommittee on Indian Affairs, on H.R. 2233 and S. 695 (May 19, 1954); Tribal Memorial (May 20, 1954); Frank Ducheneaux, et al., "Oahe: Report of Washington Delegation" (January 21-31, 1953); Missouri River Basin Investigation Project

No. 138, "Damage to Indians of Five Reservations from Three Missouri River Reservoirs in North and South Dakota," (April 1954). On the collateral issue of damages, the Court notes that, though the Cheyenne River Act compensated the Tribe for grazing permit revenue loss, the failure of the United States to make additional appropriations to the Tribe for loss of wildlife revenue does not implicitly grant it the right to control wildlife resources and the use thereof by nonmembers.

The Cheyenne River Act expressly granted tribal members certain rights and privileges incidental to hunting and fishing within the exterior boundaries of the reservation. The Act provides in § 10:

> . . . [T]he said Indian Tribe and the members thereof shall have the right to graze stock on the land between the level of the reservoir and the taking line. . . . The said Tribal Council and the members of said Indian Tribe shall have,

> without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

68 Stat. 1191, § 10.

Nevertheless, an inescapable consequence of the Cheyenne River Act was the transfer of fee ownership from the Tribe to the United States and the abrogation of the Tribe's treaty right to the exclusive use and occupation of the taken lands. The language of the Cheyenne River Act reveals no congressional intention, either express or implied, to delegate to the Tribe civil jurisdiction over nonmembers on the taken area. While § 10 confers hunting and fishing rights upon the Tribe, those rights are restricted regarding the "corresponding use by other citizens of the United States,"

meaning, presumably, nonmembers.[29] Giving the words their ordinary meaning, the Court concludes that § 10 does not affirmatively authorize the Tribe to exercise civil jurisdiction over nonmembers on the taken area.

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[29]This is not to say that § 10 expressly endorses the application of state civil jurisdiction over the recreational activities of nonmembers. The Eighth Circuit concluded that an identical "corresponding use" clause in both the Fort Randall and Big Bend Acts:

> does not clearly and unambiguously subject the hunting and fishing rights of the Lower Brule Sioux to state regulation. Indeed, the clause makes no explicit reference to state law, and thus, the "regulation" contemplated could be either by the federal government through the Secretary of Army and Corps of Engineers or by the State.

Lower Brule, 711 F.2d at 824.

What is relevant here is not whether this clause grants South Dakota regulatory jurisdiction over nonmembers on the taken area, but whether it expressly delegates that authority to the Tribe.

The legislative history surrounding the passage of the Cheyenne River Act does not compel a different conclusion. The reports of the Secretary of the Army to the House and Senate committees on Interior and Insular Affairs recommended that § 10 be eliminated as it "would involve complications since there are numerous tracts within the reservation which are owned by non-Indians." H.R. Rep. No. 2484, 83d Cong., 2d Sess. 11.; S. Rep. No. 2489, 83d Cong., 2d Sess 12. Otherwise, the agency reports on the bill submitted to Congress request no change. There is no mention of tribal jurisdiction over nonmember hunting and fishing.

An examination of the myriad hearings and negotiations which were held prior to the passage of the Cheyenne River Act illuminates only one instance where a discussion of § 10 addressed tribal jurisdiction on the taken area. Counsel for the Tribe, Mr. Ralph Case,

made this remark in a hearing before the joint Senate and House committee:

> Now, the right to hunt and fish is a tribal right. It is still preserved and is still holding. No white citizen of South Dakota can go on this reservation and hunt unless he has first obtained a license from the Tribal Council. Our right to continue hunting and fishing is to us an extremely valid and valuable right. It is an ancient right. It is all that is left of our lives as they existed a hundred years ago.

Hearings before the Committee on Interior and Insular Affairs, S. 695 Joint Hearing, Acquisition of Lands for Oahe Reservation and Indian Rehabilitation, 289 (May 20, 1954).

Read in context, however, it is the Court's understanding that Mr. Case was referring to tribal jurisdiction at the time of the hearing and was not alluding to future jurisdiction of the Tribe over nonmember hunting and fishing once the lands were

actually taken.[30] Thus, Mr. Case's use of the word "Now" should preface every statement made in the excerpted paragraph. In any event, this isolated statement falls short of the affirmative congressional action contemplated by Montana.

Circumstances surrounding the Cheyenne River Act indicate that the jurisdiction issue simply was not considered. The Tribal Memorial recommends passage of the bill as submitted and fails to address any jurisdictional conflicts which might result

[30]The first comments of Mr. Case with regard to § 10 converge on the grazing rights issue. Whether the United States would take fee title to the taken area or merely a flowage easement was a subject of grave concern to tribal members with grazing interests in the bottomlands and required the attention of the committee. Except for the comments of Mr. Case on the continued hunting and fishing rights of the Tribe, however, none of the committee members asked questions on this provision or contributed to the discussion in any way.

therefrom. In addition, a comprehensive report from the Missouri River Basin investigation staff of the Department of the Interior discussed in depth the economic impact upon the Indians which would result from the Oahe and Fort Randall Dam and Reservoir Projects, but also failed to comprehend the jurisdictional problems created by the bill. See generally Missouri River Basin Investigation Project No. 138, "Damage to Indians of Five Reservations from Three Missouri River Reservoirs in North and South Dakota," (April 1954).

It is equally clear that other legislation read in pari materia with the Cheyenne River Act did not grant tribal jurisdiction over nonmembers on nonmember fee lands or the taken area. The Indian Reorganization Act of 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 et seq.), acknowledged and reaffirmed the

governmental authority of the Tribe. This Act sought "to encourage economic development, self-determination, cultural plurality, and the revival of tribalism." F. Cohen, Handbook of Federal Indian Law 147 (1982 ed.). The Tribe's adoption of the provisions of the Indian Reorganization Act did not expand reserved treaty rights, but instead preserved existing treaty rights. The same can be said of P.L. 280 which did not change state jurisdiction over the on-reservation activities of nonmembers nor did it authorize civil jurisdiction over nonmember hunting and fishing on the taken area and fee lands. The statute merely preserved the scope of then-existing tribal jurisdiction. See Bryan v. Itasca County, 426 U.S. 373, 387, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), cert. denied, 459 U.S. 967, 103 S. Ct. 293, 74 L. Ed. 2d 277 (1982);

White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1279 (9th Cir. 1981). Finally, 18 U.S.C. § 1165, the federal trespass statute, authorizes federal jurisdiction over the taken area solely because the Cheyenne River Act granted tribal members hunting and fishing rights on the project lands. This trespass statute expands federal, not tribal, jurisdiction. See generally New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 337-38, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983).

The Court is cognizant of the detrimental effect the Cheyenne River Act had upon the Tribe and concurs with this statement by the tribal defendants:

> . . . [I]t is plain that the Cheyenne River Sioux Tribe and its members sacrificed the best lands of their reservation in order that this federal project might be built. Whatever the value of the Reservoir to the nation as a whole, it conveyed no benefit on the tribe or tribal members. To the extent that Public Law 776 [Cheyenne River Act] is ambiguous, it should be

> interpreted in a fashion that allows the fullest possible protection of the rights that the tribe retained.

Tribal Defendants' Post Trial Memorandum, p. 89 (February 26, 1990). Indeed, the Cheyenne River Act should be construed so as to defend those rights retained by the Tribe. But it cannot be ignored that the right to exclude or regulate nonmembers on land which is owned by the United States for the benefit of the general public is extraneous to the 1868 Fort Laramie Treaty and subsequent federal legislation affecting those treaty rights. The Court, in completing an examination of the Cheyenne River Act, must conclude that, although the Cheyenne River Act acquired only those property interests necessary to the construction of the Oahe Dam and Reservoir Project, Congress did not affirmatively delegate civil jurisdiction to the Tribe over

nonmember hunting and fishing activities on the taken area.

In an exhaustive examination of the Flood Control Act and the Act of September 30, 1950, 64 Stat. 1093 (hereafter Act of 1950), the State traces each Act's history to a conclusion that jurisdiction over nonmembers on the taken lands rest with the State. Without commenting on this conclusion, the Court finds instead that neither Act takes an affirmative step towards delegating jurisdiction over nonmember hunting and fishing on the taken area to the Tribe. The Court's inquiry is limited to whether Congress expressly delegated jurisdiction to the Tribe, not whether Congress intended jurisdiction to pass to the State, or, for that matter, the federal government.

Both the Flood Control Act and the Act of 1950 concerned the acquisition of project

lands and the interests to be conveyed to the United States. There is nothing in the Acts themselves or their discussion on the floors of Congress and in committee that raises the specter of tribal jurisdiction over nonmembers on the taken lands.

Congress, pursuant to § 1 of the Flood Control Act, invoked the dominant jurisdiction of the United States over "the rivers of the Nation" and authorized the construction of works to improve navigation and flood control. The Act accommodates the interests of the affected states in continued access to and use of the rivers and shorelines. The rights of Indian tribes were set aside for the moment as Congress addressed the specific interests of the

various states and tribes through subsequent legislation.[31]

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[31]The parties focused much attention on § 4 of the Flood Control Act of 1944. Section 4 allows general public use of the project reservoirs subject to regulation by the Corps of Engineers. The final sentence of § 4 states:

> No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the state in which such area is situated.

The Eighth Circuit in Lower Brule disagreed with the district court's conclusion that § 4 of the Flood Control Act of 1944 authorized the application of South Dakota's laws to hunting and fishing activities by tribal members in the Fort Randall and Big Bend taking areas. Lower Brule, 711 F.2d at 825 n.23. In concluding that the provision authorized federal, not state, regulation, the Eighth Circuit noted that, "there is simply no indication in the legislative history that Congress even considered Indian rights when it adopted section 4." Id. This observation lead to this statement by the Court:

> The "inconsistent use" provision in section 4, however,

(Footnote Continued)

Finally, the Act of 1950 was enacted merely to authorize the Army and Interior Departments to negotiate a contract with the Tribe for the purchase of project lands. The

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(Footnote Continued)
might well be relevant to the issue of whether the Tribe or the state has jurisdiction to regulate hunting and fishing by nonmembers within the Fort Randall and Big Bend taking areas. See New Mexico v. Mescalero Apache Tribe, --- U.S. ---, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983); Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980). Because we remand this issue to the district court, . . . we need not here determine the relevance of section 4 to the question of jurisdiction over nonmembers of the Tribe.

Id.

One of the issues facing this Court is whether the Tribe has jurisdiction over nonmember hunting and fishing on the taken area. According to Montana, § 4 is relevant only to the extent that it fails to expressly authorize the application of tribal law over nonmembers.

best that can be said of the Act is that it sought to preserve treaty hunting and fishing rights, though South Dakota would disagree with this statement. But, again, treaty-reserved hunting and fishing rights did not expressly delegate tribal regulatory authority over nonmembers on lands within the reservation that were owned by the United States for the general public. The Court can only conclude then that the Act of 1950 fell short of the express congressional delegation of authority required by Montana.

In looking at the preceding discussion, no affirmative action of Congress subjects nonmembers who are hunting or fishing on nonmember fee lands or on the taken area to the civil jurisdiction of the Tribe.

3

The tribal defendants contend that denying the Tribe jurisdiction over the taken area and fee lands runs afoul of the Lacey

Act, 16 U.S.C. §§ 3371 et seq. Section 3372 provides in relevant part:

(a) It is unlawful for any person --

> (1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken or possessed in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law . . . .

16 U.S.C. § 3372(a)(1) (1981).

A recent Eighth Circuit opinion concluded that a nonmember's failure to obtain a tribal fishing license and subsequent violation on taken lands was chargeable under the Lacey Act. United States v. Big Eagle, 881 F.2d 539 (8th Cir. 1989), cert. denied, --- U.S. ---, 110 S. Ct. 1145, 107 L. Ed. 2d 1049 (1990), involved a nonmember Indian caught engaging in commercial fishing without a license on the Lower Brule Reservation taken area. Indicted under the Lacey Act, Big Eagle argued that he was not in violation of any Indian tribal law

because the Lower Brule Tribe had no regulatory jurisdiction over him. The Eighth Circuit disagreed, however, stating that "the crucial inquiry is whether the acts complained of took place within the reservation and not, as Big Eagle insists, whether the Lower Brule Tribe itself has the power to prosecute." Id. at 541. The Lacey Act essentially authorizes federal jurisdiction over all reservation lands without regard to the membership status of a defendant or the power of a tribe to enforce its regulations. Id. Thus, Big Eagle decided only that the United States has jurisdiction over all persons on all lands within the reservation and did not resolve any question of the scope of tribal jurisdiction over nonmembers on the taken area. This holding is consistent with the legislative history of the Act. See H.R.

Rep. No. 276, 97th Cong., 1st Sess. 14; S.Rep.No. 123, 97th Cong., 1st Sess. 5.

The Lower Brule tribal law consisted of a settlement agreement between it and the State which required the purchase of either a state or tribal fishing permit. Big Eagle, 881 F.2d at 541. Because of this settlement agreement, the Appeals Court rejected any attempt to read Big Eagle as intimating its position with regard to future state-tribal jurisdictional conflicts:

> Thus, we do not find it necessary to decide the questions left open in Lower Brule. It would be inappropriate to do so in a case where the State of South Dakota is not a party, and where the necessary historical and administrative evidence has not been submitted. See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983); Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

Id. at 542 n.2.

Nevertheless, the tribal defendants argue that it should have jurisdiction over all persons on the taken and fee lands because the effect of Big Eagle is that tribal licensing requirements ultimately will be enforced -- by either the Tribe or the United States. But this is irrelevant to the State's complaint. The scope of the federal government's prosecutorial powers under the Lacey Act is unrelated to the question whether the Tribe can exclude nonmembers from the taken area or fee lands. A recognition that the United States may choose to enforce tribal regulations against nonmembers on all reservation lands does not force a concession from this Court, that like jurisdiction must therefore exist in the Tribe. See 16 U.S.C. § 3378(c)(3).

B

Congressional delegation of authority is not the exclusive source of tribal civil

jurisdiction over nonmembers on lands within the reservation. The United States Supreme Court pronounced two "exceptions" to Montana's general principle when it wrote:

> Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct on non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. . . .

Montana, 450 U.S. at 565 (citations omitted).

No "consensual relationship" exists here as nonmember hunters and fishermen on nonmember fee land and the taken area "do not enter any agreements or dealings with the [Cheyenne River] Tribe so as to subject themselves to tribal civil jurisdiction." Id. The Tribe, therefore, may have civil authority over hunting and fishing activities by nonmembers on the taken lands or the nonmember fee lands only if that conduct "imperils" "significant tribal interest."[32]

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[32]This second source of regulatory authority has been called an "exception" to Montana's general rule. See, e.g., Brendale, 109 S. Ct. at 3018 (Justice Blackmun); Note, Undermining Tribal Land Use Regulatory Authority: Brendale v. Confederated Tribes, 13 U. Puget Sound L. Rev. 349, 357 (1990); Note, 21 Ariz. St. L.J. at 777 (cite in note 3). Whether self-government and internal relations create an exception to the implied limitations doctrine, supra, n.3, or are an independent basis for tribal jurisdiction, this alternative source of civil authority flows from the inherent powers retained by

(Footnote Continued)

Brendale, 109 S. Ct. at 3008, 3018. This Court has previously stated in its findings of fact, however, that tribal regulation of hunting and fishing by nonmembers on the two

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(Footnote Continued)
tribes as dependent sovereigns. Doctrinal developments in Indian law evolved from early American sovereignty jurisprudent which recognized the international law of nations to subject all persons within their borders to laws that further legitimate political, social, and economic interests. See F. Cohen, Handbook of Federal Indian Law 232 (1982 ed.). An anomaly exists, however, in the relations of tribes within the United States which permits them less than the "full attributes of sovereignty." McClanahan v. Arizona Tax Comm'n, 411, U.S. 164, 173, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973). The tribes as conquered nations lost their right to determine external relations and retained only the "power of regulating their internal and social relations." Id. Any exercise of power beyond that necessary to territorial management, according to principles of Indian law, must be granted by Congress.

The Ninth Circuit has applied Montana with the most frequency. See, e.g. Confederated Tribes & Bands of Yakima Indian Nation v. Whiteside, 828 F.2d 529, 534 n.1 (9th Cir. 1987), aff'd in part, rev'd in part, 492 U.S. ---, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989).

types of land at issue does not pose a threat to the political integrity, the economic security, or the health and welfare of the Cheyenne River Tribe.

The success of the tribal game and fish management program and the protection of tribal hunting and fishing interests does not depend upon the Tribe's ability to regulate nonmember hunting and fishing activities on the two types of land involved in this case. Even though tribal lands contribute to the well-being of wildlife throughout the reservation, such is the nature of game management between states as well. Thus, it is not necessary for the Tribe to regulate nonmembers on the taken area and fee land to effectively manage game populations throughout the reservation. It must be remembered that the Tribe's programs to enhance game and fish populations encompass the entire reservation because it still

retains jurisdiction over its members throughout the reservation. As both the Tribe and the State are ultimately concerned with the effective management of game populations -- the Tribe over its reservation, the State over Dewey and Ziebach counties -- negotiation and compromise still may be required to some extent.

Nonmember conduct on the taken area and fee lands does not jeopardize the efficacy of hunting and fishing by tribal members for subsistence purposes. Subsistence activities of tribal members are not weighed by tribal conservation personnel when establishing season and bag limits. In fact, subsistence hunting and fishing is not monitored by the Tribe at this time.

A paramount tribal interest in the recreational activities of its members on the fee lands and taken area does not exist, except insofar as it generates additional

revenues. Yet loss of revenue from sales of hunting and fishing licenses to nonmembers would not imperil the economic security of the Tribe. The tribal game and fish management program is funded almost entirely through P.L. 638 contracts with the BIA. 25 C.F.R. § 271.32 (1989). The Tribe realizes little revenue from the purchase of fishing licenses by nonmembers. Moreover, the Tribe has failed to develop the Oahe fishery for its own gain despite the fact that, in the past, it has asserted jurisdiction over all persons on the taking area.

Tribal regulation of nonmember hunting and fishing on the taken area is not necessary to protect the Tribe's interest in issuing grazing permits for "sustained yield management and development" and in its tribal members' grazing livestock and other property. Title XV, Cheyenne River Sioux Tribe Grazing Code, p.1 (1988-1993). While

the Tribe cooperates with the BIA in safeguarding its members' grazing permits, grazing livestock and other Indian property can be adequately protected through the United States, the state of South Dakota, or reciprocal tribal agreements. See Duro, 110 S. Ct. at 2065-66 (discussing sources of lawful authority to punish nonmembers). The Tribe and the State adequately monitor the hunting and fishing activities of persons on the taken area to prevent such abuses.

This Court must conclude therefore that the Cheyenne River Tribe has no significant interests bearing on its internal relations which necessitate the assertion of regulatory authority over nonmembers on non-trust lands.

CONCLUSION

The boundaries of the Cheyenne River Reservation as established by the Act of 1889 remain unaltered. And though the Tribe has the treaty power to exercise regulatory

jurisdiction over tribal members throughout the entire reservation. Congress has not expressly delegated to the Tribe hunting and fishing jurisdiction over nonmembers on lands within the exterior boundaries of the reservation which are held in fee by nonmembers or which were taken by the United States for the construction of the Oahe dam and reservoir. Finally, tribal regulatory authority over nonmembers on these lands is not necessary to protect and political integrity, economic security, or health and welfare of the Tribe. Accordingly, the tribal defendants are permanently enjoined from attempting to exclude nonmembers from hunting and fishing on nonmember fee lands or the taken area within the Cheyenne River Reservation, or in any way attempting to regulate such activities.

The Court makes no finding and reaches no conclusion as to the exercise of state

jurisdiction over nonmembers on the fee lands and the taken area, see California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987), or as to the reach of tribal civil jurisdiction over nonmembers on trust land, see Merrion v. Jicarilla Apache Tribe, supra. This memorandum opinion constitutes the Court's findings of fact and conclusions of law.

BY THE COURT:

/s/ Donald J. Porter
CHIEF JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 57501

December 5, 1988

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RE: CIVIL NO. 88-3049
STATE OF SOUTH DAKOTA, Plaintiff,
vs.
WAYNE DUCHENEAUX, personally and as Chairman of the Cheyenne River Sioux Tribe, and LENITA MINER, personally and as Director of Cheyenne River Sioux Tribe Game, Fish and Parks, Defendants.

Dear Counsel:

MEMORANDUM OPINION

On November 10, 1988, the state filed a complaint in the above captioned case to seek injunctive and declaratory relief against defendants Ducheneaux and Miner, two officials of the Cheyenne River Sioux Tribe, to prevent the defendants from enforcing tribal hunting laws upon state-licensed non-Indians hunting deer on non-Indian and Army Corps of Engineers land within the Cheyenne River Indian Reservation. Fearful of confrontation between armed non-Indian deer hunters and tribal game wardens, this Court on November 10 issued a temporary restraining order, which subsequently was extended until and including November 28, 1988. The deer season for those hunting with rifles in western South Dakota expired on November 27, 1988.

On November 22, 1988, this Court heard oral arguments on whether to dissolve the

temporary restraining order or to issue a preliminary injunction. The state on that same day filed an amended complaint extending the complaint and prayer to include all hunting and fishing, instead of just deer hunting. Understandably, defendants were unprepared at the November 22 hearing to present facts regarding fishing and hunting animals other than deer. This Court therefore decided against modifying the temporary restraining order or issuing other injunctive relief, and instead held evidentiary hearings on November 28 and 29, 1988 to evaluate several difficult factual questions relating to injunctive relief.

The defendants assert that they have authority to regulate all hunting and fishing on both fee land and on the "taking area." The taking area is a gerrymandered strip of land adjacent to the Missouri River and Lake Oahe on the eastern end of the Cheyenne River

Indian Reservation. The Army Corps of Engineers owns the land, which was taken from private owners in 1954 for development of the Missouri River and Lake Oahe. Much of the taking area is fenced as parts of range units maintained by Indian ranchers who have grazing rights on the taking area. It is nearly impossible without a map to know the boundaries of the taking area since the land is not generally fenced or otherwise demarcated from trust or fee land. In many cases, hunters[33] pass through Indian land to access the taking area.

At the November 28 hearing, defendants agreed to refrain from enforcing tribal

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[33]This memorandum opinion concentrates on hunting since the bulk of the testimony in this case has focused on hunting. Everything said in this opinion regarding hunting and hunters is meant to include fishing and fishermen.

hunting laws on fee lands held by non-Indians. The defendants do not concede that they lack authority over these lands, but merely have chosen not to object at this time to the entry of a preliminary injunction regarding non-Indian fee lands. Defendants have further agreed to provide two weeks notice if they desire to change their position. Therefore, the only issue presently before this Court is whether to grant a preliminary injunction to prevent the defendants from enforcing tribal game laws on the taking area.

II. DISCUSSION

A. Standard for Issuing a Preliminary Injunction

Rule 65 of the Federal Rules of Civil Procedure authorizes this Court to issue a preliminary injunction. To determine whether to grant a preliminary injunction, this Court must consider four factors: 1) threat of

irreparable harm to the movant; 2) balance between this harm and the injury that granting the injunction will inflict on other litigants; 3) probability that movant will succeed on the merits; and 4) public interest. Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981).

A movant must show a threat of irreparable harm or the motion for a preliminary injunction will be denied. Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1987); Harris v. United States, 745 F.2d 535, 536 (8th Cir. 1984); Roberts v. Van Buren Public Schools, 731 F.2d 523, 526 (8th Cir. 1984). Because the state has failed to make a sufficient showing of irreparable injury, this Court refuses to issue a preliminary injunction with regard to the taking area.

B. Threat of Irreparable Harm to the State

The state contends that absent injunctive relief, it is threatened by three types of irreparable injury: 1) confrontation involving state-licensed hunters and tribal game wardens: 2) decreased value and marketability of the state licenses: and 3) disruption of the state's wildlife management program.

1. Confrontation

Any enforcement of hunting laws involves a certain amount of "confrontation". This Court, however, must decide whether the confrontation resulting from attempts by tribal officials to enforce tribal game laws on state-licensed non-Indian hunters poses a threat of irreparable injury sufficient to merit injunctive relief. There are two ways in which confrontation may pose a threat of irreparable injury: 1) resistance by state-licensed non-Indian hunters to the

authority of the tribal wardens possibly resulting in armed hostilities; and 2) tribal overreaching in law enforcement.

Hostile Resistance

Ron Catlin, the law enforcement staff specialist for the state's Game, Fish and Parks Department, and Don McCrea, the state's wildlife conservation officer for Ziebach County, both testified that physical confrontations between state game wardens and violators of game laws are quite rare. N. Dennis Rousseau, a game warden for the Cheyenne River Sioux Tribe's Game, Fish and Parks Department, similarly reported that he had never experienced serious resistance to his enforcement of tribal laws. Though the state game officials appear to be much better trained and educated in game management, the tribal wardens receive instruction on how to approach hunters and enforce the law. Tribal game wardens have confronted non-Indian

hunters presumed to be in violation of tribal hunting law on three occasions. Each situation was resolved peaceably. Historically, tribal game wardens have sought to avoid confrontation although by allowing non-Indians improperly hunting without a tribal license to buy the $8 sticker rather than aggressively pursuing civil charges or confiscating property. Therefore, the evidence suggests that tribal wardens will not encounter hostile resistance to tribal authority from a state-licensed hunter on the taking land.

In addition, enforcement of tribal hunting laws on the taking area does not pose as much a threat of "confrontation" as would tribal enforcement on non-Indian lands. The taking land has a distinct Indian flavor since it is owned by the federal government and largely controlled by Indians through grazing agreements. In contrast, a

state-licensed hunter on non-Indian fee land would be more likely to resist tribal authority since the land is generally not under Indian control and may indeed be owned by the hunter or the hunter's non-Indian friend.

Tribal Overreaching

A possible second threat of confrontation is tribal overreaching of its enforcement authority. Conceivably, the state would be irreparably injured if the defendants were to enforce tribal laws in such a manner as to exceed the limited tribal authority over non-Indians or deny non-Indians constitutional rights. See Greywater v. Joshua, 846 F.2d 486, 492 (8th Cir. 1988) (limited tribal authority over non-Indians); National Ass'n of Psychiatric Treatment Centers v. Weinberger, 661 F. Supp. 76, 81 (D.Colo. 1986) (impact of challenged actions on other interested parties besides

the litigants is relevant to evaluating injury); Walker v. Wegner, 477 F. Supp. 648, 653 (D.S.D. 1979), aff'd, 624 F.2d 60 (abridgement of first amendment freedoms is an irreparable injury). Historically, tribal enforcement of its hunting laws against non-Indians has been far from aggressive unreasonableness. In two instances, the tribe has sought to enforce its hunting laws arguably beyond its authority.[34] In both

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34 In 1987, tribal game warden N. Dennis Rousseau stopped a non-Indian named Michael Keys on the taking area for improperly-hunting deer. After checking with state and federal officials, Rousseau was told that the tribe lacked jurisdiction, so no action was pursued against Keys.

In another instance, several deer hunters were stopped by a tribal game warden for hunting deer on non-Indian fee land without a tribal license. The hunters simply purchased licenses from the tribe at that time. After the tribe learned that under present law no tribal license was required of non-Indians hunting on non-Indian lands, the tribe allowed the hunters to return to the

(Footnote Continued)

instances, tribal officials cooperatively rectified the situations. The tribe has not criminally prosecuted or imposed severe or unfair penalties on non-Indian hunters.

The state emphasized throughout the hearings that the tribe's original announcement before the deer hunting season about enforcement of tribal game laws mentioned that the tribe would prosecute all violators of its game laws. The state also stressed that defendant Ducheneaux has reaffirmed that the tribe would enforce its hunting laws against non-Indians if allowed to do so. Given the history of tribal

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(Footnote Continued)
reservation after deer season had ended and to hunt deer on Indian lands. Whether the tribe indeed lacked authority in these two instances is the question that this Court must resolve when the case is submitted on the merits. What is noteworthy now is that the tribe did not act unreasonably and was quick to correct perceived mistakes.

enforcement, this Court believes that defendants and the tribe's three game wardens will not pursue aggressive, overreaching enforcement of tribal game codes against non-Indians on the taking area. If the defendants' enforcement of hunting laws on the taking area trammels non-Indian rights, this Court would entertain a motion to modify the preliminary injunction. Presently, the threat of confrontation is far too speculative to qualify as a threat or irreparable injury. See Salant Acquisition Corp. v. Manhattan Industries, Inc., 682 F.Supp. 199, 202 (S.D.N.Y. 1988) (threat of irreparable injury must be actual or imminent, not remote or speculative).

2. Effect on License Value and Marketability

The state argues that if the tribe has the ability to regulate and perhaps severely restrict non-Indian hunting, the value and

sales of the state licenses will drop as non-Indian hunters will become increasingly reluctant to hunt on the reservation. Courts usually are reluctant to grant a preliminary injunction when the alleged injury is merely pecuniary in nature. See, e.g., Regents of University of California v. American Broadcasting Companies, Inc., 747 F.2d 511, 519 (9th Cir. 1984); Perpetual Bldg. Ltd. Partnership v. District of Columbia, 618 F. Supp. 603, 615 (D.D.C. 1985). Monetary loss frequently is not an irreparable injury since money damages caused by another's unlawful activities usually are recoverable and thus remediable. Morton v. Beyer, 822 F.2d 364, 372 (3d Cir. 1987); Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346, 1349 (7th Cir. 1982). The entry of a preliminary injunction regarding fee land safeguards the value of the state license with respect to non-Indian hunting on

private non-Indian land. The refusal to extend the preliminary injunction to the taking area will not appreciably affect the value and sales of state licenses for several reasons. First, the taking area is a relatively small part of the reservation; few people apparently buy state licenses to hunt exclusively on the taking area. Second, there is no indication that the tribe will enforce its law on the taking area to discourage non-Indians from hunting there altogether. Moreover, if this Court ultimately determines that the tribal defendants lack authority over the taking area, the state may be able to recover damages to the value of state licenses incurred as a result of tribal enforcement of its hunting laws in the taking area. See Danden Petroleum, Inc. v. Northern Natural Gas Co., 615 F. Supp. 1093, 1099 (N. Tex. 1985) (injury is irreparable only if it

cannot be undone through monetary relief). Therefore, shared regulation of hunting on the taking land during the pendency of this case does not pose a threat or irreparable injury to the value and marketability of state licenses.

3. Game Management

The State engages in detailed game management throughout the Cheyenne River Indian Reservation by stocking fish, safeguarding habitats and monitoring wildlife. The tribe meanwhile does very little game management. The state contends that failure to preliminarily enjoin the tribal officers from enforcing their game laws would disrupt state management of game in Dewey and Zeibach counties.

The state's argument has merit in that tribal control of hunting throughout the reservation could frustrate the state programs for carefully controlled and

preserved game population and habitat. However, according to the testimony of Wesley Rice, the senior biologist of the state Game, Fish & Parks Department, the state is able to effectively manage wildlife on the reservation despite exclusively controlling hunting on only half of the land.[35] Since the state can effectively manage game without 100% exclusive control of reservation hunting, allowing shared regulation of the relatively small strip of land called the taking area will not irreparably injure state game management. Moreover, the tribe does not seek to disrupt state game management policies. Indeed, notwithstanding this litigation, the state conservation officers

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[35]The preliminary injunction preserves the state's exclusive control of hunting by non-Indians on non-Indian lands. Approximately half of the reservation land is non-Indian fee land.

and tribal game wardens appear to enjoy an amicable relationship.

C. Conclusion

The state has not met its burden of showing a threat of irreparable injury if the defendants are allowed to enforce their hunting laws on the taking area. The conclusion is based on a review of the situation as it presently exists. If tribal hunting laws are enforced in a manner detrimental to the state, this Court may reconsider this decision. This ruling on the preliminary injunction does not imply a view on the merits or on whether the tribe could successfully challenge a preliminary injunction concerning non-Indian fee land. This ruling similarly is not meant to discourage state enforcement of state hunting laws on the taking land.

BY THE COURT:

DONALD J. PORTER

CHIEF JUDGE

Filed November 10, 1988
William F. Clayton
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

STATE OF SOUTH DAKOTA,

Plaintiff

TEMPORARY RESTRAINING ORDER

vs.

CIVIL NO. 88-3049

WAYNE DUCHENEAUX, Personally and as Chairman of the Cheyenne River Sioux Tribe and as LENITA MINER, personally and as Director of the Cheyenne River Sioux Tribe Game, Fish and Parks,

Defendants.

The Court has examined the pleadings, documents and affidavits submitted by the plaintiff State of South Dakota. It appears that the defendants Wayne Ducheneaux and Lenita Miner intend to restrain non-Indians from hunting on fee land and public land

within the Cheyenne River Indian Reservation. It further appears that the defendants are about to attempt to subject non-Indians to the criminal jurisdiction of tribal courts.

This Court is satisfied that the plaintiff State of South Dakota will be irreparably injured if the defendants are allowed to take these actions. The State has licensed 353 deer hunters to hunt on non-Indian lands in Dewey and Ziebach Counties on the Cheyenne River Indian Reservation. The game wardens of the Cheyenne River Indian Reservation who will be attempting to prevent all hunters not licensed by the Tribe from hunting on the Reservation will be carrying guns. In this situation, the likelihood of armed confrontation is high.

This Court is also satisfied that no irreparable harm will result to the Tribe. It appears that the allowance of

state-licensed hunting on non-Tribal lands is the status quo. This temporary restraining order is intended to preserve the status quo until rights to regulate hunting on the Reservation can be fully adjudicated.

This Court notes that there is a substantial likelihood of the State succeeding on the merits. Under Montana v. United States, 450 U.S. 544 (1981), tribal rights to regulate non-Indian hunting on non-Indian lands within a reservation are limited. Similarly, under Gregwater v. Joshua, 846 F.2d 486 (8th Cir. 1988) and under Article V, § 1(c) of the Bylaws of the Cheyenne River Sioux Tribe of South Dakota, the tribe appears to lack jurisdiction over non-Indian hunters it apprehends without the consent of the non-Indian.

Finally, this Court perceives no reason why a temporary restraining order would contravene the interests of justice. Rights

to regulate hunters on non-Indian lands within the reservation should be decided in due course before this Court, rather than by threats days before deer hunting season begins. Therefore, it is

ORDERED that defendants and all others in concert with them who have actual notice of this order shall cease any attempt to restrain non-Indians possessing state hunting licenses from hunting on non-Indian or public lands within the Cheyenne River Sioux Indian Reservation. It is further

ORDERED that defendants and all others in concert with them who have actual knowledge of this order shall cease any attempt to subject non-Indians to arrest or prosecution in tribal courts unless in accordance with Article V, § 1(c) of the Bylaws of the Cheyenne River Sioux Tribe of South Dakota.

Dated November 10, 1988.

BY THE COURT:

DONALD J. PORTER
CHIEF JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

By: VICKY J. REINHARD
Deputy

(SEAL OF COURT)

Flood Control Act of 1944, Pub.L. 534, 58 Stat. 889 (1944), Section 4.

Sec. 4. The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: Provided, that preference shall be given to Federal, State, or local governmental agencies, and licenses may be granted without monetary consideration, to such agencies for the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the

public interest. The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

Pub. L. No. 870, 64 Stat. 1093 (1950)

AN ACT

To authorize the negotiation and ratification of separate settlement contracts with the Sioux Indians of Cheyenne River Reservation in South Dakota and of Standing Rock Reservation in South Dakota and North Dakota for Indian lands and rights acquired by the United States for the Oahe Dam and Reservoir, Missouri River development, and for other related purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Chief of Engineers, Department of the Army, jointly with the Secretary of the Interior, representing the United States of America, are hereby authorized and directed to negotiate contracts containing the provisions outlined herein separately with the Sioux Indians of the Cheyenne River Reservation in

South Dakota and with the Sioux Indians of the Standing Rock Reservation in South Dakota and North Dakota, through representatives of the two tribes appointed for this purpose by their tribal councils.

Sec. 2. The contracts made pursuant to section 1 of this Act shall--

(a) convey to the United States the title to all tribal, allotted, assigned, and inherited lands or interests therein belonging to the Indians of each tribe required by the United States for the reservoir to be created by the construction of the dam across the Missouri River in South Dakota, to be known as Oahe Dam, including such lands along the margin of said reservoir as may be required by the Chief of Engineers, United States Army, for the protection, development, and use of said reservoir: Provided, That the date on

which the contract is signed by Chief of Engineers, United States Army, and the Secretary of the Interior shall be the date of taking by the United States for purposes of determining the ownership of the Indian tribal, allotted, and assigned lands conveyed thereby to the United States, subject to the determinations and the payments to be made as hereinafter provided for:

(b) provide for the payment of--

(1) just compensation for lands and improvements and interests therein, conveyed pursuant to subsection (a);

(2) costs of relocating and reestablishing the tribe and the members of each tribe who reside upon such lands so that their economic, social, religious, and community life can be reestablished

and protected: Provided, That such costs of relocating and reestablishing the tribe and the members of each tribe who reside upon such lands shall not result in double compensation for lands and properties to the tribe and members of each tribe; and

(3) costs of relocating and reestablishing Indian cemeteries, tribal monuments, and shrines located upon such lands;

(c) provide that just compensation for the lands of individual members such tribes, who reject the appraisal covering their individual property, shall be judicially determined in proceedings instituted for such purpose by the Department of the Army in the United States district court for the

district in which the lands are situated;

(d) provide a schedule of dates for the orderly removal of the Indians and their personal property situated within the taking area of the Oahe Reservoir within the respective reservations: Provided, That the Chief of Engineers shall have primary and final responsibility in negotiating concerning the matters set out in the foregoing paragraphs (a) and (b) hereof;

(e) provide for the final and complete settlement of all claims by the Indians and tribes described in section 1 of this Act against the United States arising because of construction of the Oahe project.

Sec. 3. To assist the negotiators in arriving at the amount of just compensation as provided herein in section 2 (b) (1), the

Secretary of the Interior or his duly authorized representative and the Chief of Engineers, Department of the Army, or his duly authorized representative shall cause to be prepared an appraisal schedule on an individual tract basis of the tribal, allotted, and assigned lands, including heirship interests therein, located within the taking areas of the respective reservations. In the preparation thereof, they shall determine the fair market value of the lands, giving full and proper weight to the following elements of appraisal: Improvements, severance damage, standing timber, mineral rights, and the uses to which the lands are reasonably adapted. They shall transmit the schedules to the representatives of the tribes appointed to negotiate a contract, which schedules shall be used as a basis for determining the amount of just compensation to be included in the contracts

for the elements of damages set out in section 2 hereof.

Sec. 4. The specification in sections 2 and 3 hereof of certain provisions to be included in each contract shall not operate to preclude the inclusion in such contracts of other provisions beneficial to the Indians who are parties to such contracts.

Sec. 5. (a) The contracts negotiated and approved pursuant to this Act shall be submitted to the Congress within eighteen months from and after the date of enactment of this Act.

(b) No such contract shall take effect until it shall have been ratified by Act of Congress and ratified in writing by three-quarters of the adult members of the two respective tribes designated in section 1 hereof, separately, within nine months from the date of the Act ratifying each said contract: Provided, That in the event the

negotiating parties designated by section 1 of this Act are unable to agree on any item or provision in the proposed contracts, said items or provisions shall be reported separately to the Congress as an appendix to each contract, and shall set out the provisions in dispute as proposed by the advocates thereof for consideration and determination by the Congress.

Sec. 6. Nothing in this Act shall be construed to restrict the orderly prosecution of the construction or delay the completion of the Oahe Dam to provide protection from floods on the Missouri River.

Approved September 30, 1950.

Pub. L. No. 776, 68 Stat. 1191 (1954).

AN ACT

To provide for the acquisition of lands by the United States required for the reservoir created by the construction of Oahe Dam on the Missouri River and for rehabilitation of the Indians of the Cheyenne River Sioux Reservation, South Dakota, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this agreement between the United States of America and the Sioux Indians of Cheyenne River Reservation in South Dakota, Witnesseth, That this agreement when enacted by Congress and when confirmed and accepted in writing by three-quarters of the adult Indians of the Cheyenne River Reservation in South Dakota, as shown by the tribal rolls of

the said reservation, does hereby convey to the United States all tribal, allotted, assigned, and inherited lands or interests within said Cheyenne River Reservation belonging to the Indians of said reservation, which lands are required by the United States for the reservoir to be created by the construction of the dam across the Missouri River in South Dakota, now known as Oahe Dam, including such lands along the margin of said proposed reservoir as may be required by the Chief of Engineers, United States Army, for the construction, protection, development, and use of said reservoir all as described in part II of this agreement, subject, however, to the conditions of this agreement hereinafter set forth: Provided, That the effective date of this Act shall be the date when the Secretary of the Interior shall by proclamation declare that this agreement has been ratified and approved in writing by

three-quarters of the adult members of said Indians as above defined.

SECTION II. The United States agrees to pay, out of funds appropriated for construction of the Oahe project, as just compensation for all lands and improvements and interests therein (except the agency hospital) conveyed pursuant to section I of this Act; and for the bed of the Missouri River so far as it is the eastern boundary of said Cheyenne River Reservation, the sum of $5,384,014; which sum shall be in final and complete settlement of all claims, rights, and demands of said Tribe or allottees or heirs thereof arising out of the construction of the Oahe project, and shall be deposited to the credit of said Tribe in the Treasury of the United States, to draw interest on the principal thereof at the rate of 4 per centum per annum until expended: Provided, That the said Tribal Council with the approval of the

Secretary of the Interior shall distribute the sum of $2,250,000 in accordance with the revised appraisal of the Missouri River Basin investigation staff of the Department of the Interior.

SECTION III. The United States further agrees to appropriate, and the Secretary of the Army is authorized and directed to make available from sums so appropriated to be charged against the cost of construction of the Oahe project, further additional appropriations for the special purposes of relocating and reestablishing the Indian cemeteries, tribal monuments and shrines within the taking area for said reservoir described in Part II of this Act as the Tribal Council of said Indian Tribe shall select and designate, which sums shall be expended on the recommendation of the Tribal Council with the approval of the Secretary of Interior.

SECTION IV. The United States further agrees to appropriate, and the Secretary of the Army is authorized and directed to make available from sums so appropriated to be charged against the cost of construction of the Oahe project, further additional appropriations which shall be expended for the relocation and reconstruction of Cheyenne River Agency, relocation and reconstruction of schools, hospitals, service buildings, agents and employees quarters, roads, bridges and incidental matters or facilities in connection therewith.

SECTION V. In addition to the sum set out in section II hereof, the United States further agrees that it will appropriate and make available a further sum in the total amount of $5,160,000 which shall likewise be deposited in the Treasury of the United States to the credit of said Indian Tribe to draw interest on the principal thereof at the

rate of 4 per centum per annum until expended for the purpose of complete rehabilitation for all members of said Tribe who are residents of the Cheyenne River Sioux Reservation at the time of the passage of this Act, whether or not residing within the taking area of the Oahe Project, and for relocating and reestablishing members of said Tribe who reside upon such lands conveyed to the United States to the extent that the economic, social, religious, and community life of all said Indians shall be restored to a condition not less advantageous to said Indians than the condition that the said Indians now are in: Provided, That said fund provided for in this section shall be expended upon the order and direction of the Tribal Council of said Tribe, with the approval of the Secretary of the Interior, for the purposes set forth in this section: Provided further, That the authorization

contained in section XVI hereof shall remain available for a period not to exceed ten years from the effective date of this Act.

SECTION VI. The United States agrees that all mineral rights of whatsoever nature at or below the surface within the taking area as described in Part II hereof shall be and hereby are reserved to said Indian Tribe or individual owners or holders of lands or interests in lands as their interests may appear under section I hereof, subject to future extraction and use by said Tribe or said members thereof or their heirs, successors, or assigns, but also subject to all reasonable regulations which may be imposed by the Chief of Engineers, United States Army, for the protection and use by the United States of the taking area for the purposes of the Oahe Dam and Reservoir Project.

SECTION VII. The members of said Indian Tribe shall have the right without charge to cut and remove all timber and to salvage any portion of the improvements within said taking area either by demolition or removal, and the owners of the land whereon said improvements stand shall have a prior right to such salvage but if said right is waived or not exercised before the date of the notice provided for in section IX hereof, the Tribal Council shall have the right to designate others to demolish or remove said timber and improvements or in the discretion of the Tribal Council, said demolition or removal may be undertaken and carried out by said Tribal Council: Provided, That the salvage permitted by this section shall not be construed as "double compensation" as set out in section 2(b)(2) of Public Law 870, Eighty-first Congress.

SECTION VIII. The United States and the Indian parties to this agreement recognize that a hazard to livestock is created by the rise and fall of the waters to be impounded in Oahe Reservoir. They also recognize that said hazard is not subject to exact determination at this time, therefore the parties to this agreement agree that all hazards which may develop when the annual rise and fall of Oahe Reservoir can reasonably be determined shall be met by the United States by such protective measures as may be necessary to minimize losses to the Indian parties hereto as to livestock only.

SECTION IX. Members of said Indian Tribe now residing within the taking area of the project shall have the right without charge to remain on and use the lands hereby conveyed as said lands are now being used from and after the effective date of this Act to the point in time where the gates of Oahe

Dam are to be closed for the impoundment of the water of the Missouri River. The Chief of Engineers shall give public notice one year in advance of the prospective date of the closing of said gates for said purpose and all improvements of whatever nature, all timber of whatever kind or class shall be salvaged or removed or else shall be considered as abandoned by the Tribe or by the individual owners at a date six months subsequent to the date of the notice given by the Chief of Engineers. All individuals and personal property shall remove or be removed from the taking area before the expiration of the one year's notice given by the Chief of Engineers as aforesaid. And the United States shall not be liable for any loss of life or property not so removed from the taking area from and after the expiration of said notice.

SECTION X. After the Oahe Dam gates are closed and the waters of the Missouri River impounded, the said Indian Tribe and the members thereof shall have the right to graze stock on the land between the level of the reservoir and the taking line described in Part II hereof. The said Tribal Council and the members of said Indian Tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

SECTION XI. The United States through the Department of Interior shall render all aid and assistance to individual members of said Tribe whose lands are within the said taking area for the purposes of purchasing land in the name of the United States for

said individuals and the United States shall reconvey said lands under trust patent to the individual owners upon the selection by said owners of the land which they decide to have purchased for them. The said trust patents shall be in form and effect the same as corresponding trust patents heretofore issued to said individuals. The holders of exchange assignments within the said taking area shall be regarded as holders of trust patents and shall be accorded the same privileges and procedures as holders of land held in trust as in this section provided.

The funds for the purchase of such substitute land in all cases shall be provided by the individual apply for such purchase and reconveyance as is herein described, out of monies placed to his credit for the transfer of his lands, improvements and timber under the authority of this agreement and the subsequent Act of Congress

herein provided for but no service charge shall be made by the United States in addition to the cost of the substitute allotment. The lands so selected and purchased as substitute allotments may be either within the boundaries of the Cheyenne River Reservation as diminished by this agreement or outside said reservation as may meet the desires of the individuals involved in the several transactions: Provided, That no purchase of lands outside the Cheyenne River Reservation shall affect the existing status of such lands, interests or rights therein, or improvements thereon, with respect to taxation. No prior Act of Congress or Departmental regulation shall be held to be a bar to the full operation of this section, nor shall the Tribal Constitution, ordinance or resolution thereunder be held to be a bar to the full operation of this section, numbered XI.

SECTION XII. No part of any expenditure made by the United States under any or all of the provisions of this agreement and the subsequent acts of ratification shall be charged as an offset or counter claim against any tribal claim which has arisen under any treaty, law, or executive order of the United States prior to the effective date of taking of said land as provided for in section I hereof and the payment of Sioux benefits as provided for in section 17 of the said Act of March 2, 1889 (25 Stat. 888), as amended, shall be continued under the provision of section 14 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), on the basis now in operation without regard to the loss of tribal land within the taking area under the provisions of this agreement.

SECTION XIII. The United States agrees to reimburse the said Tribal Council for expenses incurred by it and caused by, or

incident to, the negotiations which have led up to the making and ratification of this agreement: Provided, That such reimbursable expenses do not exceed in the aggregate $100,000, of which not more than $50,000 shall be payable as attorney fees. The Tribal Council shall send a statement to the Secretary of the Army setting out said expenses up to the date of the proclamation to be issued by the Secretary of the Interior declaring that the Act of Congress approving this agreement is in full force and effect. The Secretary of the Army shall forward said statement to the Congress for appropriation together with his recommendations.

SECTION XIV. Holders of inherited lands or interests in lands may consolidate their interests by and between themselves and the total proceeds in the hands of any individual held by such consolidation of interests may be used by any individual holder of the same

for purchase of substitute lands as in section XI provided.

SECTION XV. The right of any individual member of said Indian Tribe to reject the final appraisal made on his land and improvements shall be preserved and, if any individual does reject such final appraisal, he shall file notice of such rejection by notice in writing to the Chief of Engineers, United States Army, who shall thereupon file a proceeding in the United States District Court of the District of South Dakota as in a condemnation proceeding and jurisdiction is hereby conferred upon said Court to determine, by procedure corresponding to a condemnation proceeding, the value of said land and improvements and the said Tribal Council shall deposit with the clerk of said court the full amount set out in the final appraisal which was previously offered to said individual, which fund shall be used in

payment in full or in part of the final judgment of said United States District Court. Cost of such proceedings shall be borne by the United States and the individual involved shall be entitled to counsel at his own expense. In the event the amount of the appraisal so deposited in said Court is not enough to cover the final judgment in said proceeding, the United States shall pay such difference from the fund of $5,384,014 established under section II, hereof, into the hands of the clerk of said Court and thereupon title shall vest in the United States.

SECTION XVI. There is hereby authorized to be appropriated not to exceed $10,644,014, as provided by sections II, V, and XIII, exclusive of the sums to be charged against the cost of construction of the Oahe project as provided in sections III and IV hereof.

PART II

The lands conveyed by this agreement are the following tracts of land all in the State of South Dakota:

Township 5 north, range 30 east, Black Hills meridian

Section 5: Northwest quarter northwest quarter northeast quarter; north half northwest quarter; north half southeast quarter northwest quarter; northwest quarter southwest quarter northwest quarter.

Section 6: Northeast quarter northeast quarter; northeast quarter southeast quarter northeast quarter; north half northwest quarter northeast quarter; east half northeast quarter northwest quarter.

Township 6 north, range 29 east, Black Hills meridian

Section 1: Lots 1, 2, 5, and 6.

Township 6 north, range 30 east, Black Hills meridian

Section 28: Southwest quarter southeast quarter.

Section 33: Northeast quarter northwest quarter northeast quarter; southeast quarter northwest quarter.

Township 7 north, range 29 east, Black Hills meridian

Section 21: All.

Section 34: Southeast quarter.

Township 7 north, range 30 east, Black Hills meridian

Section 19: Lots 1, 2, and 3.

Section 20: Lot 1.

Section 29: Lots 1, 2, and 3.

Section 30: Northeast quarter northeast quarter; each half southeast quarter northeast quarter; north half northwest quarter northeast quarter; north half northeast quarter northwest quarter.

Section 31: West half northeast quarter; lots 6, 7, and 8.

Section 32: Lot 1.

Township 8 north, range 23 east, Black Hills meridian

Section 1: Lots 5 and 6.

Township 9 north, range 23 east, Black Hills meridian

Section 36: South half southwest quarter and lots 2, 3, and 4.

Township 9 north, range 24 east, Black Hills meridian

Section 12: South half south half northeast quarter; northwest quarter southeast quarter; southeast quarter northeast quarter southwest quarter; east half southwest quarter southwest quarter; lots 2, 3, 4, and 5.

Section 13: West half northwest quarter; northwest quarter southwest quarter; lots 6, 7, 8, and 9.

Section 14: South half; south half northwest quarter; west half southwest quarter northeast quarter; east half southeast quarter northeast quarter.

Section 15: Southeast quarter northeast quarter; south half southeast quarter southeast quarter.

Section 22: North half northeast quarter northeast quarter; northeast quarter southeast quarter; southeast quarter northwest quarter southeast quarter; lots 2 and 3; lot 1 except ten acres in the form of a square situated in the northwest corner thereof.

Section 23: Northwest quarter; northwest quarter northeast quarter; lots 6, 7, 8, and 9.

Section 27: Lots 5, 6, 8, 9, and 10; lot 7, except ten acres in the form of a square, situated in the northwest corner thereof.

Section 28: South half southeast quarter; south half north half southeast quarter.

Section 31: Southeast quarter northeast quarter; lots 6, 7, 8, and 9.

Section 32: South half south half northwest quarter; lots 8 and 9.

Section 33: Lots 5 and 6.

Section 34: Northwest quarter southeast quarter northwest quarter; lots 1, 2, and 3. [The remainder of the land descriptions are ommitted.]

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 57501

July 3, 1989

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RE: CIVIL NO. 88-3049
STATE OF SOUTH DAKOTA, Plaintiff
vs.
WAYNE DUCHENEAUX, personally and as Chairman of the Cheyenne River Sioux Tribe, and LENITA MINER, Personally and as Director of Cheyenne River Sioux Tribe Game, Fish and Parks, Defendants.

Dear Counsel:

MEMORANDUM OPINION

On November 10, 1988, plaintiff State of South Dakota (the State) filed the above captioned case naming as defendants Wayne Ducheneaux, chairman of the Cheyenne River Sioux Tribe (the Tribe), and Leneta Miner, director of the Tribe's game, fish and parks program. The amended complaint seeks injunctive relief and a declaratory judgment concerning the authority of defendants and the Tribe to regulate non-Indian hunting on the Cheyenne River Indian Reservation. In particular, the action focuses on tribal authority over non-Indian hunters both on non-Indian fee land within the reservation and on a strip of land adjacent to Lake Oahe called the "taking area."

Upon the request of the State, this Court issued and later extended a temporary restraining order to prevent possible armed confrontation between state-licensed

non-Indian deer hunters and tribal game wardens. On November 28 and 29, 1988, the parties presented to this Court live testimony and oral arguments on whether preliminary injunctive relief was merited. In an opinion filed on December 6, 1988, this Court declined to issue a preliminary injunction restraining the tribal defendants from enforcing its hunting laws on the taking area. Since the defendants decided not to contest the State's request for a preliminary injunction concerning fee lands, this Court issued a preliminary injunction to enjoin enforcement of tribal hunting laws upon non-Indians on non-Indian fee lands within the reservation. South Dakota v. Ducheneaux, No. 88-3049, slip op. (D.S.D. December 5, 1988), reprinted in, 16 Indian L. Rep. 3012.

On March 27, 1989, defendants filed a motion to dismiss which raises three issues: 1) whether the portion of the complaint

alleging that defendants have threatened criminal sanctions against non-Indians should be dismissed because the allegation does not present a case of controversy: 2) whether the United States is an indispensable party under Rule 19 of the Federal Rules of Civil Procedure such that the suit may not proceed without the participation of the United States: and 3) whether the case can proceed despite the sovereign immunity of the Cheyenne River Sioux Tribe and the absence of the Tribe from the suit. This Court answers each of these questions in the negative at this time and thus denies defendants' motion to dismiss.

I. Case or Controversy Issue

Part of what triggered this case was a statement issued by defendant Ducheneaux a few days before the beginning of deer hunting season on the reservation. The statement read:

> Due to the state of South Dakota's intransigence, all hunters must now hold a Cheyenne River Sioux tribal hunting license to hunt on any and all lands within the exterior boundaries of the reservation. The state licenses will no longer be honored and violators are subject to prosecution in tribal court.

The State interprets the use of the word "prosecution" as threatening criminal sanctions against non-Indians and asserts that the Tribe lacks criminal jurisdiction over non-Indians under Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978). The defendants, however, disavow any desire to hold non-Indians criminally accountable and instead contend that "prosecution" refers only to civil forfeiture sanctions. Indeed, defendant Ducheneaux testified during the hearing held on November 28 and 29, 1988 that the statement was not meant to threaten criminal prosecutions. The State remains unconvinced and worries that the defendants still harbor thoughts of resorting to

criminal penalties in enforcing hunting laws against non-Indians. In addition, the State contends that the ostensibly civil penalty of forfeiture under the tribal laws in actually a criminal sanction.

The question of whether defendant Ducheneaux's statement really threatened criminal prosecution is largely collateral to the true issue in this case -- the extent of tribal authority over non-Indian hunters on various parts of the Cheyenne River Indian Reservation. Because this question presented is broad and because each counsel has demonstrated an ability to present relevant facts in a concise yet thorough fashion, this Court is inclined to preserve for trial the disputed contentions of the parties, including the argument of the State that the Tribe's present forfeiture statute is criminal in nature. Although there is limited evidence that the Tribe has or

intends to impose criminal penalties against non-Indian hunters, this Court after trial will be better able to evaluate the evidence of the State to the contrary. Consequently, it is premature to dismiss the portion of the complaint concerning criminal sanctions.

II. The United States as an Indispensable Party

Defendants seek dismissal of the complaint by arguing the United States is an indispensable party without whom the case cannot proceed. In short, defendants contend that the United States is indispensable because it holds title to the taking area and is a party to several compacts which have a bearing on resolution of this case. Defendants argue that the case cannot be effectively litigated absent the United States and that relitigation of issues involved in this case may occur if the United States is not a party to this suit.

Defendants suggest that the United States is amenable to suit under 5 U.S.C. § 702 and that suit should initially be brought in tribal court anyway.

The State answers that relitigation and inconsistent resolutions of the issues in this care are virtually inconceivable regardless of whether the United States is a party to the suit. In addition, the State argues that the United States is aware of this suit and can voluntarily intervene if it perceives that its interests are effected. Finally, the State contends that sovereign immunity bars suit against the United States and that there is no alternative forum in which to bring this suit.

There is no precise formula for determining whether a party is indispensable. Niles-Cement-Pond Co. v. Iron Moulders' Union No. 68, 254 U.S. 77, 80 (1920). Nevertheless, Rule 19 and a number of federal cases

provide substantial guidance in analyzing questions concerning joinder and indispensable parties. Rule 19(a) of the Federal Rules of Civil Procedure provides:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest of (ii) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. . . .

Rule 19(a) defines who is an indispensable party. With regard to the claims concerning tribal regulation of non-

Indian hunting on non-Indian land, the United States is not an indispensable party. This case calls for interpretation of federal statutes and compacts, but the interest of the United States in adjudicating the right of the Tribe to regulate non-Indian hunting on fee land does not make the United States an indispensable party. Litigation of this case without joining the United States would neither impair its interest in non-Indian hunting on fee land nor subject other parties to multiple obligations concerning the fee lands. This Court still can enter a declaratory judgment as requested in the complaint and adjudicate the right to regulate non-Indian hunting on parts of the Cheyenne River Indian Reservation even if the United States does not participate in the case. The absence of the United States from this case does not impede entry of complete relief with regard to non-Indian hunting on

fee land. Consequently, the United States is not an indispensable party under Rule 19(a)(1).

The United States might be an indispensable party for adjudication of rights to regulate hunting on the taking area since the United States holds the title to the area. However, under Rule 19(b) of the Federal Rules of Civil Procedure, dismissal of this action would be inappropriate even if the United States is indispensable to litigate hunting rights on the taking area. Rule 19(b) states:

> (b) Determination by Court Whenever Joinder not Feasible. If a person as described in sub-division (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be

> prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The doctrine of sovereign immunity prevents this Court from compelling the United States to participate in this suit. The United States is immune from suit unless it consents to be sued, and the terms of that consent define federal jurisdiction over a suit involving the United States. United States v. Mitchell, 445 U.S. 535, 538 (1980). Two noteworthy waivers of sovereign immunity are codified at 28 U.S.C. § 1346 and 5 U.S.C. § 702, but neither of these provisions would permit compelling the United States to participate in this suit. The parties have not cited any other statute which would waive

sovereign immunity in this case, and this Court is not aware of any such statute.

Since the sovereign immunity of the United States prevents joining the United States as a party, this Court must determine "whether in equity and good conscience the action should proceed." Rule 19(b) provides four factors to aid a court in determining whether to proceed without an indispensable party who cannot be joined. In addition, the United States Supreme Court has mentioned several policy considerations underlying Rule 19(b). Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110-111 (1968); see also Nichols v. Rysavy, 809 F.2d 1317 (8th Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 147, 98 L.Ed.2d 103. Having reviewed these factors and being quite familiar with this case, this Court in equity and good conscience concludes that the present parties should be allowed to proceed

with this case. The United States has been notified about the pendency of this case and can intervene or file amicus curiae briefs if it so desires.

III. Tribe as Indispensable Party

Defendants also argue for dismissal on the grounds that the failure to join the Cheyenne River Sioux Tribe prevents fair adjudication of the case. Presumably, the Tribe's sovereign immunity prohibits a suit directly against the Tribe, so the State has elected to sue two tribal officers, who have authority to enforce tribal hunting laws. The defendants argue that the suit should be against the Tribe and not against tribal officials and that tribal sovereign immunity bars this suit altogether absent tribal consent to be sued. Settled legal authority permits suit against tribal officers alleging that the officers took actions outside of the scope of their authority. Santa Clara Pueblo

v. Martinez, 436 U.S. 49, 59 (1978) (officer of tribe not protected from suit by tribe's sovereign immunity); Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983), cert. denied, 467 U.S. 1214 (1984) (tribal immunity does not bar suits alleging officer's conduct that is outside scope of a tribe's sovereign powers); Tenneco Oil v. Sac & Fox Tribe, 725 F.2d 572, 574-75 (10th Cir. 1984); Wisconsin v. Baker, 524 F. Supp. 726 (D. Wisc. 1981), modified, 698 F.2d 1323 (7th Cir. 1983), cert. denied, 463 U.S. 1207. It is primarily a factual question whether the actions of the defendants regarding tribal authority over non-Indian hunters are beyond the scope of the defendants' authority and thus whether a suit against tribal officers is appropriate. Resolution of this factual question at this time is premature; this Court will be in a much better position to evaluate such a question after trial.

Consequently, the defendants' motion to dismiss is denied at this time.

BY THE COURT:

DONALD J. PORTER
CHIEF JUDGE